

Applicant Details

First Name **Daniel**
 Middle Initial **G.**
 Last Name **Stephen**
 Citizenship Status **U. S. Citizen**
 Email Address dgstephen@wm.edu

Address
 Address
 Street
4456 Lydias Drive
 City
Williamsburg
 State/Territory
Virginia
 Zip
23188
 Country
United States

Contact Phone Number **7819562026**

Applicant Education

BA/BS From **George Washington University**
 Date of BA/BS **May 2019**
 JD/LLB From **William & Mary Law School**
<http://law.wm.edu>
 Date of JD/LLB **May 19, 2024**
 Class Rank **5%**
 Law Review/Journal **Yes**
 Journal(s) **William and Mary Law Review**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships **Yes**
 Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Hutter, Paul

pjhutter@wm.edu

Gibney, Jr., The Honorable John A.

john_gibney@vaed.uscourts.gov

804-916-2870

Kaplan, Robert

rekapl@wm.edu

757-221-3804

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DANIEL STEPHEN

4456 Lydias Drive, Williamsburg, Virginia 23188 | (781) 956-2026 | dgstephen@wm.edu

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am a rising third-year law student at William & Mary Law School, where I am ranked 4th (tied) in my class with a 3.8 G.P.A. and serve as a staff member for the *William & Mary Law Review*. I am writing to apply for a one-year clerkship in your chambers for the 2024-2025 term. My experience externing for a federal judge has inspired my desire to clerk, and a clerkship in your chambers would enable me to continue strengthening my research and writing skills and offer exposure to a variety of substantive areas of the law. I would welcome the opportunity to work in your chambers and to serve the Hampton Roads area I have come to call my home over the last two years at law school.

While externing for the Honorable John A. Gibney Jr., I developed the research, writing, and organizational skills that will allow me to thrive as a clerk. For Judge Gibney, I wrote both an internal memorandum and a draft opinion for a social security benefits appeal case. This was both my first assignment and an area of the law that was unknown to me, but I quickly learned how to familiarize myself with the subject matter, identify relevant case law, and apply precedent to the facts. I also wrote an internal memorandum that involved civil procedure, contract law, and tort law. I comprehensively analyzed the civil procedure questions for each state law claim in a succinct manner, and logically organized the memorandum to avoid redundancy even as many of the issues had recurring arguments.

Further, my current experience as a summer associate at Squire Patton Boggs has sharpened my research and writing skills. In this role, I have intentionally taken on assignments for different legal areas, ranging from federal investigations to litigation. In these assignments, I have drafted both formal memoranda and informal work product that can be presented orally.

I have enclosed for your review my resume, writing sample, law school transcript, and letters of recommendation from the Honorable John A. Gibney Jr., Dean Robert Kaplan, and Professor Paul Hutter. I would be grateful for the opportunity to interview and further discuss my qualifications. Thank you for your consideration.

Respectfully,
Daniel Stephen

DANIEL STEPHEN

4456 Lydias Drive, Williamsburg, Virginia 23188
(781) 956-2026 | dgstephen@wm.edu

EDUCATION

William & Mary Law School, Williamsburg, Virginia

J.D. expected, May 2024

G.P.A.: 3.8, Class Rank: 4/175 (tied)

Honors: **William & Mary Law Review**
CALI Award for highest grade in Legal Research and Writing I

Publications: Note, *Press Play to Presume: The Policy Benefits Behind the Trademark Modernization Act's Resurrection of the Irreparable Harm Presumption in False Advertising Cases*, 65 WM. & MARY L. REV. (forthcoming 2024).

Activities: Virginia Bar Association Law School Council, Outreach Chair
Jewish Law Students Association

The George Washington University, Washington, DC

B.A., *cum laude*, Psychology major, Criminal Justice minor, May 2019

G.P.A.: 3.53

Honors: Dean's List (Spring 2018, Spring 2019)

EXPERIENCE

Squire Patton Boggs LLP, Washington, DC

Summer Associate

May 2023 to July 2023

Researched a variety of substantive legal areas including state contract law, FCPA enforcement actions, and legal ethics case law. Performed discovery document review in a state law litigation matter involving a cybersecurity attack and a breach of contract. Wrote an internal memorandum analyzing the attorney-client privilege in litigation involving third-party judgment risk insurers.

The Honorable John A. Gibney Jr., U.S. District Judge

United States District Court for the Eastern District of Virginia, Richmond, Virginia

Judicial Extern

January 2023 to April 2023

Researched and wrote draft opinions resolving a compassionate release petition and a social security benefits appeal. Researched and drafted internal memoranda including a motion to remand for lack of diversity jurisdiction, a tortious interference claim, a breach of contract claim, and a motion to sever. Analyzed and drafted internal memoranda for use during various sentencing hearings and pretrial conferences.

William & Mary Veterans Benefits Clinic, Williamsburg, Virginia

Summer Intern

June 2022 to August 2022

Managed over 15 veterans' claims cases under the supervision of an attorney. Worked on both initial disability compensation claims and appeals to the Department of Veterans Affairs (VA). Undertook legal research and wrote memoranda and letters to support appeals to the VA. Analyzed thousands of medical and military records. Directly contacted existing clients and conducted intake interviews for new clients.



Unofficial Grade Sheet

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.
- Students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.
- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is likely that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Students with a rounded cumulative GPA of 3.5 and above have typically received a percentage rank calculation that falls in the top 1/4 of a class.
- Please also note that there may be some variation in how students provide their grade information, as instead of this grade sheet, some students may provide a copy their unofficial grade information as downloaded directly from the University's online system.

Date Prepared: May 28, 2023

Daniel Stephen

781-956-2026

dgststephen@wm.edu

Date of Expected Graduation: 05/2024

Cumulative GPA: 3.78

Semester [Fall 2021]

Course Title	Credits	Grade
Criminal Law	4	A-
Civil Procedure	4	A-
Torts	4	A-
Legal Research & Writing I	2	A
Lawyering Skills I	1	H (Honors Pass)

Term GPA: 3.74

Cumulative GPA: 3.74

Semester [Spring 2022]

Course Title	Credits	Grade
Property	4	A-
Constitutional Law	4	A
Contracts	4	A-
Legal Research & Writing II	2	A
Lawyering Skills II	2	H (Honors Pass)

Term GPA: 3.82

Cumulative GPA: 3.78

Semester [Fall 2022]

Course Title	Credits	Grade
William & Mary Law Review	1	P (Pass)
Professional Responsibility	2	A
First Amendment – Free Speech & Press	3	A
Copyright Law	3	A
Business Associations	4	A-

Term GPA: 3.90

Cumulative GPA: 3.82

Semester [Spring 2023]

Course Title	Credits	Grade
William & Mary Law Review	1	P (Pass)
Judicial Externship	4	P (Pass)
Advanced Writing & Practice – Transactional Writing	2	B+
Legislative/Statutory Interpretation	3	A
The Military Commissions Seminar	2	A
Securities Litigation	3	B+

Term GPA: 3.65
Cumulative GPA: 3.78

Courses in Progress
Semester [Fall 2023]

Course Title	Credits
Advanced Writing & Practice – Civil Writing	2
Evidence	3
Criminal Procedure Survey	3
Intellectual Property	3
Academic Freedom, Free Speech & University Speech	2
SCOTUS & Police Interrogations	1

* This grade sheet has been self-prepared by the above-named student. The student will bring a copy of an "Unofficial Transcript" at the time of an interview or forward one at the request of an employer.

Paul J. Hutter
Adjunct Professor of Law

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23185

Phone: (703) 328-3677
Email: pjhutter@wm.edu

May 31, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend my student, Daniel Stephen, for a judicial clerkship. He is smart, writes well, communicates effectively, researches creatively and possesses the integrity and temperament of a superior law clerk. He will be an asset to any Judge's chambers.

By way of introduction, I currently serve as the General Counsel for the Uniformed Services University of the Health Sciences, my third experience leading law offices in the Department of Defense and Veterans Affairs. I also have provided consulting services for Booz Allen Hamilton and teach classes at the William & Mary Law School concerning the Military Commissions in Guantanamo, Cuba and Law Firm Leadership. I met Daniel this semester as he took the Military Commissions course.

Daniel is an excellent student, distinguishing himself through his writing and during our extensive in-class discussions. He demonstrated clear, logical thinking; he was always well prepared for class – often going beyond the required reading to gain additional perspective; and his arguments always were well presented. He captured the black letter law and the nuances associated with the many opinions issued by the U.S. Supreme Court and other federal courts concerning the Commissions. Daniel's final paper in the course demonstrated his creativity and provided a strong, logically developed, and well-written argument for prosecuting terrorists in Article III courts instead of military commissions.

During our discussions in and out of class, Daniel demonstrated his honest approach to life and the law. He drew well from his summer externship and internship experiences and his varied leadership roles at William & Mary Law School to achieve a mature, focused outlook on the law and life in general.

I would hire Daniel to work in any of the offices I have been privileged to lead and urge you to do the same. He will work hard, learn quickly and exceed your expectations.

Sincerely,

/s/

Paul J. Hutter
Adjunct Professor of Law

Paul Hutter - pjhutter@wm.edu

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
701 East Broad Street, Suite 6014
RICHMOND, VIRGINIA 23219-3528

Chambers of
John A. Gibney, Jr.
United States District Judge

(804) 916-2870

June 12, 2023

Dear Jamar,

I hope this letter finds you well. It was good seeing you in Norfolk last week.

I write to recommend Daniel Stephen, a William and Mary law student who has applied for a clerkship with you.

Daniel worked in our chambers as an intern last semester. Although he was a volunteer, he essentially worked as a law clerk for us. He did research, wrote, and drafted opinions. He caught on very quickly to how we do things, and after a very short time his work needed little editing.

Daniel is very intelligent, and has strong analytic skills. He sorts through tough questions and explains them succinctly. When we talked about his work, it became clear that he had thought about the research and the ramifications of various approaches to a legal problem.

Perhaps the most impressive thing about Daniel is his professionalism. As you will see from his resume, he worked before law school at two firms, including doing research and document analysis. This gave him a leg up on getting to the heart of tricky issues.

Finally, Daniel was a good person to have around. He got along with everyone, did whatever we asked (including thankless jobs), and had good work habits. We could just give him a job and know that it would be done correctly, with a minimum of follow up.

June 10, 2019

Page Two

Daniel is a strong candidate, and I hope that you will give him serious consideration for a clerkship.

Please feel free to call me if you have questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "JAG", written over the printed name "John A. Gibney, Jr.".

John A. Gibney, Jr.

JAGjr/s

Robert E. Kaplan
Associate Dean and Professor of the Practice

William & Mary Law School
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Williamsburg, VA 23187-8795

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June 02, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Judicial Clerkship Recommendation for
Daniel Stephen, William & Mary Law School, Class of 2024

Dear Judge Walker:

I am pleased to enthusiastically recommend Daniel Stephen for a judicial clerkship starting in Fall 2024.

Mr. Stephen was a student in my Legal Writing course during both semesters of the 2021-2022 academic year. That course involved weekly classes, frequent individual conferences, and preparation of four major memoranda and numerous other writing projects. Mr. Stephen was one of only ten students in his section, so I worked closely with him.

Mr. Stephen demonstrated the capacity for thorough research, cogent analysis, and precise, concise writing. He easily grasped concepts and quickly learned areas of law with which he was unfamiliar. Mr. Stephen earned A's for both the Fall 2021 and Spring 2022 semesters and the CALI Award for the highest grade in his section for Fall 2021. Fall semester involved objective writing; spring semester covered persuasive writing. Because the techniques of and audiences for those types of writing are different, it is unusual for the same student to be at the top of the class in both semesters. Mr. Stephen was one of those students.

My Legal Writing courses require students to work in small groups. Mr. Stephen displayed an appropriate balance between leading group efforts and playing a supporting role. He comfortably collaborated with classmates from diverse backgrounds and having a broad range of temperaments and work styles. Mr. Stephen's capacity to forge strong professional and personal relationships is due, in part, to his successful extracurricular experiences with diverse peers and colleagues at William & Mary and as a legal assistant for two years before attending law school.

As the director of William & Mary's externship program, I am familiar with Mr. Stephen's service during Spring 2023 as an extern for The Honorable John Gibney, Jr., U.S. District Judge for the Eastern District of Virginia. Field supervisors assess externs on seven criteria – attitude, initiative, professionalism, research, writing and analysis, oral communication, and overall performance. Mr. Stephen earned "Outstanding" assessments on all seven components. "Outstanding" is the highest among six rankings and reflects performance that "consistently and significantly exceeds expectations." These comments were among those included in Mr. Stephen's assessment:

- "Dan brought a positive attitude every day. He not only accepted feedback well, but he also incorporated that feedback into later assignments. He had great curiosity and engagement throughout his externship."
- "Dan was a pleasure to have in Chambers. He completed work timely and asked focused and thoughtful questions. He collaborated well with all the law clerks."
- "Dan produced well-researched work product that was very helpful to the law clerks. He did not spin his wheels on issues."
- "Dan quickly demonstrated a strong ability to draft well-reasoned and clear memoranda and opinions with little supervision. He took ownership of complex assignments and tackled tough questions thoroughly and thoughtfully."
- "We appreciated the thoroughness of his assignments and his researching skills. In one opinion, Dan caught a detail that none of the parties identified, which strengthened the Court's analysis and conclusions. We valued his contributions to Chambers."
- "We thoroughly enjoyed having Dan in Chambers this semester. He contributed to many difficult assignments, and we appreciated his enthusiasm and positivity."

I have had the pleasure to get to know Mr. Stephen outside of class. Discreet and professional, Mr. Stephen smiles easily and often, and he has a refreshing sense of humor. He takes his work – but not himself – seriously. I believe Mr. Stephen's integrity to

Robert Kaplan - rekapl@wm.edu - 757-221-3804

be beyond reproach. In my dealings with him in and out of class, he has demonstrated a strong moral compass and sound judgment.

Mr. Stephen is an intellectually strong student, a consummate professional, and an engaged and engaging person. I hope you and your colleagues will have the opportunity to work with and get to know him.

Sincerely,

/s/

Robert E. Kaplan

Robert Kaplan - rekapl@wm.edu - 757-221-3804

DANIEL STEPHEN

4456 Lydias Drive, Williamsburg, Virginia 23188 | (781) 956-2026 | dgstephen@wm.edu

WRITING SAMPLE

I prepared this draft opinion during my spring externship with the Honorable John A. Gibney Jr. of the U.S. District Court, Eastern District of Virginia. I have obtained Judge Gibney's consent to use this document as a writing sample. All sensitive and/or confidential information has been redacted.

This was the first draft of an opinion determining whether to accept, modify, or reject a Magistrate Judge's report and recommendation. This draft opinion is substantially my own work and has not been edited by others.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

[Redacted],

Plaintiff,

v.

Civil Action No. **x:xx-cv-xxx**

KILOLO KIJAKAZI,

Acting Commissioner of Social Security.

OPINION

The plaintiff challenges the Social Security Administration (“SSA”) Commissioner’s final decision denying her claim for disability insurance benefits and supplemental security income. On October 17, 2019, an Administrative Law Judge (“ALJ”) found the plaintiff not disabled and subsequently denied her benefits. (R. at 21-39.) The plaintiff moved for summary judgment in this Court, while the defendant moved to remand. On June 30, 2022, the Magistrate Judge issued a Report and Recommendation (“R&R”) on the parties’ motions. (ECF No. 30.) The R&R recommended that the Court (1) grant in part the plaintiff’s motion for summary judgment to the extent it requests remand but deny the plaintiff’s motion to the extent it requests an immediate award of benefits; (2) grant the defendant’s motion to remand; (3) reverse the final decision of the Commissioner; and (4) remand the case for further proceedings.

The parties agree that the Court should remand this case because the ALJ erred. The plaintiff, however, objects to the R&R on grounds that the ALJ’s determination is not supported by substantial evidence in the record. Specifically, she argues that the Magistrate Judge incorrectly concluded that the vocational expert’s (“VE”) testimony created an ambiguity that requires further proceedings. She argues that the testimony instead demonstrates that her limitation represents an accommodation in the workplace. She contends that, because of this accommodation, clear

evidence of her disability exists, and the Court should remand and award her immediate benefits instead of remanding the case for further proceedings. (*Id.* at 11.)

The Court has reviewed the record and agrees that the VE's ambiguous testimony requires remand for further proceedings. Accordingly, the Court will adopt the R&R in whole and overrule the plaintiff's objections.

I. BACKGROUND

The plaintiff filed a claim with the SSA for disability insurance benefits and supplemental security income in 2018. (R. at 242, 251.) The ALJ conducted a hearing on August 22, 2019, where counsel represented the plaintiff and a VE testified on her behalf. (R. at 49-82, 174.) The ALJ concluded that the plaintiff's residual functional capacity ("RFC") "requires no special supervision after the task has been learned, but for one (1) to two (2) business weeks following assignment of a new task[], she may require two (2) additional five (5) minute visits per week to ensure understanding of a task as well as proper and timely completion." (R. at 29-30.)

During the proceedings, the VE testified regarding whether the plaintiff could achieve work in the national economy given her RFC, age, education, and work experience. (R. at 83-92.) The ALJ then asked a series of hypotheticals to the VE. (R. at 83-92.) The ALJ first posed whether a person could acquire work in the national economy if they required "for one to two business weeks[] following assignment of a new task,...two additional five-minute [supervisor] visits[] per week [for one to two business weeks after they were assigned a new task] to ensure understanding of the task, as well as proper and timely completion." (R. at 84-86.) This hypothetical reflected the plaintiff's actual RFC. The VE answered that at least three types of suitable work exist in the national economy, with 195,000 positions available for the three jobs. (R. at 87.) When asked

whether more frequent supervision—one to two times per day instead of per week—would preclude all work, the VE testified that it would. (R. at 88.)

The plaintiff's counsel then questioned the VE about the ALJ's first hypothetical requiring the additional meetings one to times per week, asking whether that level of supervision "is . . . something that's normal in a work environment." (R. at 88.) The VE described the requirements as a "borderline accommodation," and that "[i]t's not necessarily unusual that employers...need to follow up on their instructions and the type of work that's being performed." (*Id.*) When the attorney asked whether "[it] could affect [the] number [of jobs in the national economy]" if the frequency of the follow-up "was deemed to be accommodated by certain companies," the VE responded: "Absolutely. I think that's something that has to be determined by the individual employer. If it's accommodated work, in my mind, it's not work that's routinely performed in the national economy. It's something other than that." (R. at 89.) When the ALJ later asked "which side of [borderline]" the RFC falls on, the VE answered, "with the hypothetical individual that was posed to me, I believe it would be accommodated work." (R. at 91.)

At the end of the hearing, the ALJ asked the plaintiff's counsel, "which hypo it was that led to the borderline accommodating, and I don't remember if it was 1 or 2", to which counsel responded: "[t]hat – he said in [hypo] 1, I believe." (R. at 91-92.) The VE then said, "[r]ight" and the ALJ replied, "[t]hat was the accommodated portion. Okay. I just wanted to make sure I had this right." (R. at 92.)

In her decision denying benefits, the ALJ cited the VE's testimony that the plaintiff's RFC still enabled her to obtain work in the national economy, concluding that "the claimant is capable of making a successful adjustment to other work that exists in significant numbers in the national economy." (R. at 33.) The ALJ's decision did not mention the VE's testimony claiming that the

hypothetical reflecting the plaintiff's RFC is "borderline accommodated work" and would fall on the "side" of "accommodated." (R. & R. 11.) Consistent with the VE's other testimony, that would make the plaintiff's RFC an accommodation and would preclude work in the national economy.

On July 12, 2021, the plaintiff filed a complaint in this Court to review the Commissioner's decision pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). Both parties agree that the Court should reverse the ALJ's decision. Accordingly, on June 30, 2022, the Magistrate Judge issued an R&R recommending the Court reverse the ALJ's decision and remand the case for further proceedings. The plaintiff now objects to the R&R and argues that the Court should remand this case to the SSA with direction to award immediate benefits.

II. DISCUSSION

1. Legal Standard

This Court reviews *de novo* any part of the R&R to which a party has properly objected. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). The Court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommended disposition. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3).

The SSA's regulations set forth a five-step process that the agency uses to determine whether disability exists. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); *see Mascio v. Colvin*, 780 F.3d 632, 634-35 (4th Cir. 2018) (describing the ALJ's five-step sequential evaluation). The claimant qualifies as disabled when her RFC bars her from performing other work "that exists in significant numbers in the national economy." *Woods v. Berryhill*, 888 F.3d 686, 689 (4th Cir. 2018) (citing §§ 404.1560(c); 404.1520(c)).

A reviewing court can only reverse an ALJ's denial of benefits if either "the ALJ's decision [is not] supported by substantial evidence" or the ALJ reaches her factual finding "by means of an improper standard or misapplication of the law." *See Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987). In addition, "[w]here there are gaps in the administrative record . . . the proper course is a remand to the Commissioner for further proceedings." *Brascher v. Astrue*, No. 3:10cv256, 2011 WL 1637045, at *3 (E.D.V.A. Apr. 29, 2011) (quoting *Ianni v. Barnhart*, 403 F.Supp.2d 239, 257 (W.D.N.Y. 2005)). Further, "when an ALJ fails to provide a 'logical explanation' connecting its RFC analysis to the record evidence, the 'proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Carr v. Kijakazi*, No. 20-2226, 2022 WL 301540, at *4 (4th Cir. Feb. 1, 2022) (first quoting *Thomas v. Berryhill*, 916 F.3d 307, 311–12 (2019); and then quoting *Radford v. Colvin*, 734 F.3d 288, 295 (2013)). "[I]t is only in those cases – where it is clear that there is no account on which substantial evidence would support a denial of coverage – that a court may exercise its discretion to direct the award of benefits as a remedy for a failure to explain." *Id.* Ultimately, the ALJ, and not the reviewing court, must resolve conflicts in the record, including inconsistent testimony. *See Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990).

2. Analysis

The plaintiff argues that the record unequivocally shows that she qualifies as disabled. Specifically, she argues that the VE's testimony establishes that the plaintiff's RFC contains an accommodation, which would preclude work in the national economy. The crux of the plaintiff's argument relies on the VE's response when the ALJ pressed the VE about "what side" of "borderline [accommodated]" the first hypothetical matching the plaintiff's RFC "falls on," and the VE testified, "I believe it would be accommodated." (*Id.* at 4; R. at 91.) The plaintiff further

contends that the ALJ “received the clarification she sought before ending the hearing” when she asked, “which hypo...led to the borderline accommodating” and the plaintiff’s counsel replied, “he [the VE] said it in [hypo] 1, I believe.” (ECF No. 31, at 5.). The VE then said “[r]ight” and the ALJ replied, “[t]hat was the accommodated portion.” (*Id.*) The plaintiff argues this testimony reveals the ALJ understood the RFC to include an accommodation, meaning no substantial evidence exists to support a denial of disability and benefits. She contends that the Magistrate Judge, therefore, should have remanded with direction to award benefits instead of for further proceedings.

Recently, the Fourth Circuit addressed the question of when a district court should direct an award of benefits rather than remand for further proceedings. *See Carr v. Kijakazi*, No. 20-2226, 2022 WL 301540 (4th Cir. Feb. 1, 2022). In *Carr*, two experts gave conflicting testimony about the frequency of the plaintiff’s panic attacks and whether this limitation required special accommodations that would prevent him from working in the national economy. *Id.* at *5. The Fourth Circuit found that because of this ambiguity and inconsistency, “the proper remedy is to remand for the explanation that will make possible a ‘meaningful review’ of the ALJ’s determination.” *Id.* (citing *Radford v. Colvin*, 734 F.3d 288, 296 (4th Cir. 2013)). Further, “when an ALJ fails to define a limit included in an RFC...it will be ‘difficult, if not impossible,’ to determine whether that restriction is supported by substantial evidence.” *Id.* at *4; *see also Thomas*, 916 F.3d at 312.

The Magistrate Judge correctly concluded that the VE gave conflicting and ambiguous testimony about the accommodation. Initially, the VE testified that the hypothetical matching the plaintiff’s actual RFC would permit her to obtain work in the national economy, with 195,000 positions available. (R. at 86-87.) The VE then testified that more frequent visits by a supervisor

compared to the plaintiff's RFC would escalate the plaintiff's RFC into "accommodated work." (R. at 87-89.) The VE further testified that the hypothetical reflecting the plaintiff's RFC was "borderline accommodated work" and that if he had to choose, he would consider it on the "side" of accommodated work rather than non-accommodated work. (R. at 89-92.) The ALJ even asked the VE to clarify whether the limitation would require accommodated work, and the VE stated that accommodated work "i[s] not work that's routinely performed in the national economy." (R. at 89.)

The plaintiff argues that the VE's testimony, and the ALJ's later clarifying question, resolves any ambiguity that may have initially existed. But the VE's testimony did not resolve this ambiguity, explain his reasoning for the discrepancy, or indicate that he misspoke initially and meant to clarify that the plaintiff's RFC requires an accommodation. Instead, he simply said "[r]ight" when the plaintiff's counsel and the ALJ inquired about whether the first hypothetical represented an accommodation. (R. at 92.) This testimony indicates that the RFC's limitation could represent non-accommodated, borderline accommodated, or even accommodated work. The record, therefore, "mak[es] it impossible for a court to definitively conclude that there was not substantial evidence to support a decision denying coverage." *See Carr*, 2022 WL 301540, at *3 (citation and quotations omitted).

The plaintiff also argues that the hearing resolved any ambiguity at its conclusion when the ALJ "clarified" that the first hypothetical reflecting the plaintiff's actual RFC "was the accommodated portion." (ECF No. 31, at 5.) But this produces an inconsistency with the ALJ's ultimate denial of benefits. In her decision, the ALJ held that "based on the testimony of the [VE]...considering the claimant's age, education, work experience, and residual functional capacity, the claimant is capable of making a successful adjustment to other work that exists in

significant numbers in the national economy.” (R. at 33.) The ALJ relied on the VE’s testimony discussing the plaintiff’s ample job opportunities even with her RFC. (R. at 33.) The ALJ, therefore, either believed that the plaintiff’s RFC does not constitute an accommodation, or it does, but no disability exists because she could work in the national economy. Regardless of these two outcomes, enough evidence certainly exists showing that the ALJ failed to define or understand a limit included in the RFC and that the proper remedy is to remand for meaningful review. *See Carr*, 2022 WL 301540, at *3-5 (citation and quotations omitted).

In sum, this is not “the unusual case in which it can be determined, even in the absence of an explanation, that there is no account on which substantial evidence could support a denial of benefits.” *Id.* at *3 (citation omitted); *see also Breeden v. Weinberger*, 493 F.2d 1002, 1012 (4th Cir. 1974). Here, the VE’s testimony that the hypothetical matching the plaintiff’s RFC limitation includes possibly both accommodated and non-accommodated work bears directly on whether the ALJ could consider her disabled. Like *Carr*, this “is not the rare case in which it is clear that an ALJ decision denying benefits, properly explained, could not be supported by substantial evidence in the record.” *Carr*, 2022 WL 301540, at *3. Accordingly, substantial evidence exists supporting a denial of benefits and does not warrant a remand for direction to award benefits.

III. CONCLUSION

The Court will overrule the plaintiff’s objections to the R&R, grant the plaintiff’s motion for summary judgment in part to the extent that it requests remand and deny in part to the extent it requests an immediate award of benefits, grant the defendant’s motion to remand, reverse the final decision of the Commissioner, and remand the case for further proceedings. Accordingly, the Court will adopt the Magistrate Judge’s R&R.

Applicant Details

First Name **Makaela**
 Middle Initial **B.**
 Last Name **Stevens**
 Citizenship Status **U. S. Citizen**
 Email Address stevensmakaela@gmail.com

Address
Street
4301 W. 24th Place #1232
City
Lawrence
State/Territory
Kansas
Zip
66047
Country
United States

Contact Phone Number **6202140852**

Applicant Education

BA/BS From **Kansas State University**
 Date of BA/BS **May 2022**
 JD/LLB From **University of Kansas School of Law**
<http://www.law.ku.edu>
 Date of JD/LLB **May 12, 2024**
 Class Rank **25%**
 Law Review/Journal **Yes**
 Journal(s) **Kansas Law Review**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Wamble, Jabari
jabari.wamble@usdoj.gov
913-551-6730

Levy, Richard
rlevy@ku.edu
785-864-9220

Allman, Christopher
chris.allman@usdoj.gov
913-551-6684

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MAKAELA B. STEVENS

4301 W. 24th Pl., Apt. 1232, Lawrence, KS 66047
stevensmakaela@gmail.com | (620) 214-0852

June 11, 2023

Dear Judge Walker:

My name is Makaela Stevens, and I am a rising 3L at the University of Kansas School of Law. I am writing to apply for a 2024-2025 clerkship with your chambers at the United States District Court for the Eastern District of Virginia. I would like to tell you about myself and the skills that I believe would make me a strong addition to your chambers.

My experiences as a student have made me an improved reader, communicator, and writer. While completing my bachelor's degree in English Literature, I worked at the United States Law Library of Congress as a research intern in the Digital Resources Division, where I researched legislative history and wrote for publication on the Law Library's website. During law school, I worked as an intern at the United States Attorney's Office, District of Kansas, drafting research memorandums for criminal and civil matters and drafting criminal complaints and indictments. As a volunteer for the KU Law Guardianship Assistance Program, I drafted pleadings to help low income families obtain guardianship of their children with disabilities. Additionally, I served on the Kansas Law Review as a Staff Editor in 2022-23, and I will serve as an Articles Editor in 2023-24. My writing sample is an excerpt from the Comment I wrote as a Staff Editor, which will be published in Volume 72 of the Kansas Law Review.

My resume, unofficial transcripts, and writing sample are included with this application, as well as my recommendations from Professor Richard Levy, Assistant United States Attorney Jabari Wamble, and Assistant United States Attorney Christopher Allman. Please let me know if I can provide any additional information. Thank you for your consideration, and I look forward to hearing from you.

Sincerely,



Makaela Stevens

MAKAELA B. STEVENS

4301 W. 24th Pl., Apt. 1232, Lawrence, KS 66047
stevensmakaela@gmail.com | (620) 214-0852

EDUCATION

University of Kansas School of Law

Juris Doctor, Rising 3L

GPA: 3.5, Rank: 27 / 118

- Rice Scholarship Recipient
- Kansas Law Review
 - o Staff Editor (2022-23), Articles Editor (2023-24)
- Pro Bono Distinction
 - o Guardianship Assistance Program, 2022; Expungement Clinic, 2022
- Member: Public Interest Law Society, Women in Law, Christian Legal Society

Lawrence, KS
Anticipated May 2024

Kansas State University

Bachelor of Arts in English Literature, *summa cum laude*

GPA: 4.00

- LEAD Accelerated Law Degree Program
- KSU Pre-Law Ambassadors, Secretary
- Silver Key Sophomore Honorary, Chair of Health Committee
- Hallum Walker Davis Award, 2020 (KSU English Department)

Manhattan, KS
May 2022

RECENT WORK EXPERIENCE

Hinkle Law Firm LLC

Summer Law Clerk

- Working in departments throughout the firm, including family law, insurance litigation, estate planning, election law, real estate, care and treatment, and adoptions.

Wichita, KS
May 2023 – Present

United States Attorney's Office, District of Kansas

Summer Intern

- Research for criminal and civil matters; drafted criminal complaints and indictments; trial preparation

Kansas City, KS
May 2022 – Aug. 2022

United States Law Library of Congress

Research Intern, Digital Resources Division

- Conducted research and wrote blog posts/story maps for publication.
- Topics: History of language education in the U.S. told through federal legislation and regulations; German Language during WWI; Influence of English language on U.S. territories.

Washington, D.C. (Remote)
May 2021 – Aug. 2021

Jackson Legal Group, LLC

Legal Intern

Scott City, KS
Aug. 2019 – Jan. 2021

COMMUNITY INVOLVEMENT

Night to Shine Volunteer; Faith E-Free Children's Ministry Volunteer; KSU Center for Child Development



LAW Academic Summary - Unofficial

Name: Makaela Stevens

Student ID: 2926586

Institution Info: University of Kansas
Lawrence, KS 66045

Print Date: 06/05/2023

Beginning of LAW Record

LAW Career Totals			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Cum GPA	3.500	Cum Totals	78.000	59.000	57.000	199.300

2021 Fall

Program: Law Professional

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	804	Civil Procedure	4.000	4.000	A-	14.800
LAW	809	Contracts	4.000	4.000	A-	14.800
LAW	820	Lawyering Skills I	2.000	2.000	A-	7.400
LAW	831	Torts I	4.000	4.000	B+	13.200
			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	3.590	Term Totals	14.000	14.000	14.000	14.000
Cum GPA	3.590	Cum Totals	14.000	14.000	14.000	50.200

2022 Spring

Program: Law Professional

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	806	Introductn Constitutional Law	4.000	4.000	B+	13.200
LAW	814	Criminal Law	4.000	4.000	B	12.000
LAW	821	Lawyering Skills II	3.000	3.000	B	9.000
LAW	826	Property	4.000	4.000	A-	14.800
			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	3.270	Term Totals	15.000	15.000	15.000	15.000
Cum GPA	3.420	Cum Totals	29.000	29.000	29.000	99.200

2022 Summer

Program: Law Professional

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	972	Professional Responsibility	2.000	2.000	B+	6.600
			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	3.300	Term Totals	2.000	2.000	2.000	2.000
Cum GPA	3.410	Cum Totals	31.000	31.000	31.000	105.800



LAW Academic Summary - Unofficial

Name: Makaela Stevens

Student ID: 2926586

2022 Fall

Program: Law Professional

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	850	Administrative Law	3.000	3.000	B+	9.900
LAW	908	Evidence	3.000	3.000	B+	9.900
LAW	913	Federal Income Taxation	3.000	3.000	A-	11.100
LAW	935	Juvenile Law	2.000	2.000	A-	7.400
LAW	950	Law Review	1.000	1.000	CR	0.000
			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	3.480	Term Totals	12.000	12.000	11.000	11.000
Cum GPA	3.430	Cum Totals	43.000	43.000	42.000	144.100

2023 Spring

Program: Law Professional

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	845	Jurisdiction	3.000	3.000	B+	9.900
LAW	869	Contract Drafting	3.000	3.000	A-	11.100
LAW	892	Business Organizations	3.000	3.000	A-	11.100
LAW	910	Federal Courts & Federal System	3.000	3.000	A	12.000
LAW	950	Law Review	1.000	1.000	CR	0.000
LAW	992	Trial Advocacy	3.000	3.000	A-	11.100
LAW	992	Trial Advocacy	0.000	0.000		0.000
			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	3.680	Term Totals	16.000	16.000	15.000	15.000
Cum GPA	3.500	Cum Totals	59.000	59.000	57.000	199.300

2023 Summer

Program: Law Professional

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	994	Special Topics:	1.000	1.000		0.000
Course Topic:		US Cntrtrrorism Law Intl Persp				
LAW	994	Special Topics:	1.000	1.000		0.000
Course Topic:		Comparative Family Law				
LAW	994	Special Topics:	1.000	1.000		0.000
Course Topic:		Europn Union Global Legl Reg				
			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	0.000	Term Totals	3.000	0.000	0.000	0.000
Cum GPA	3.500	Cum Totals	62.000	59.000	57.000	199.300



LAW Academic Summary - Unofficial

Name: Makaela Stevens
Student ID: 2926586

2023 Fall

Program: Law Professional

<u>Course</u>		<u>Description</u>	<u>Attempted</u>	<u>Earned</u>	<u>Grade</u>	<u>Points</u>
LAW	827	International Law and Litertre	3.000	3.000		0.000
LAW	873	Commercl Law:Secured Transactn	3.000	3.000		0.000
LAW	881	Conflict of Laws	3.000	3.000		0.000
LAW	950	Law Review	1.000	1.000		0.000
LAW	952	Legal Aid Clinic	6.000	6.000		0.000
			<u>Attempted</u>	<u>Earned</u>	<u>GPA Units</u>	<u>Points</u>
Term GPA	0.000	Term Totals	16.000	0.000	0.000	0.000
Cum GPA	3.500	Cum Totals	78.000	59.000	57.000	199.300

End of LAW Academic Summary - Unofficial

STUDENT NAME	STUDENT NUMBER	DATE PREPARED	PAGE
MAKAELA BREANNE STEVENS	XXX-XX-XXXX	02/09/2023	1 OF 2
BIRTH DATE	ACADEMIC PROGRAM	ACADEMIC PLAN	ACADEMIC SUBPLAN
06/28/YYYY	AS UNDERGRADUATE DEGREE	ENGLISH MAJOR	LITERATURE TRACK
	UG UNDERGRADUATE NON DEGREE	PRE-LAW MAJOR	
		UNIVERSITY HONORS PROGRAM-N MAJOR	
	BA UNDERGRADUATE NON DEGREE	BUSINESS MINOR	
	AS UNDERGRADUATE NON DEGREE	JOURNALISM & MASS COMM MINOR	

----- EXTERNAL DEGREES -----
 SCOTT COMMUNITY HIGH SCHOOL
 05/31/2018 HIGH SCHOOL DIPLOMA

----- TRANSFER CREDITS -----
 GARDEN CITY COMMUNITY COLLEGE 15.00
 ATTENDANCE DATES FROM: 08/01/17 TO: 05/01/18
 UNIVERSITY OF KANSAS 14.00
 ATTENDANCE DATES FROM: 08/01/21 TO: 05/01/22

----- BEGINNING OF UNDERGRADUATE RECORD -----
 FALL 2018

COURSE	TITLE	ATT	EARNED	GRD	POINTS
DAS 195	CAT COMMUNITY CONNECTNS	1.00	1.00	A	4.000
COURSE TOPIC(S): TOP/LAW AND SOCIETY					
ENGL 297	HON/INTRO HUMANITIES	3.00	3.00	A	12.000
PHILO 160	INTRO PHILO OF LAW	3.00	3.00	A	12.000
POLSC 115	U S POLITICS	3.00	3.00	A	12.000
SPAN 101	SPANISH I	5.00	5.00	A	20.000
UHP 189	HONORS 1ST-YEAR SEMINAR	1.00	1.00	A	4.000
COURSE TOPIC(S): TOP/BEES, PLATO & WHO KNOWS WHAT					
TERM GPA : 4.000		TERM TOTALS : 16.00		16.00	64.000
CUM GPA : 4.000		CUM TOTALS : 16.00		45.00	64.000
SEMESTER HONORS					

SPRING 2019

COURSE	TITLE	ATT	EARNED	GRD	POINTS
ENGL 310	INTRO LIT STUDIES	3.00	3.00	A	12.000
ENGL 382	AMERICAN SURVEY 2	3.00	3.00	A	12.000
GEOL 100	EARTH IN ACTION	3.00	3.00	A	12.000
GEOL 103	GEOLOGY LABORATORY	1.00	1.00	A	4.000
PSYCH 110	GENERAL PSYCHOLOGY	3.00	3.00	A	12.000
SPAN 102	SPANISH II	5.00	5.00	A	20.000
TERM GPA : 4.000		TERM TOTALS : 18.00		18.00	72.000

* * CONTINUED ON NEXT COLUMN * *

* * CONTINUED FROM PREVIOUS COLUMN * *
SPRING 2019

	ATT	EARNED	POINTS
CUM GPA : 4.000 CUM TOTALS :	34.00	63.00	136.000
SEMESTER HONORS			

FALL 2019

COURSE	TITLE	ATT	EARNED	GRD	POINTS
ENGL 361	BRITISH SURVEY 1	3.00	3.00	A	12.000
ENGL 387	AMERICAN INDIAN LIT	3.00	3.00	A	12.000
ENGL 490	DEV ENGLISH LANGUAGE	3.00	3.00	A	12.000
PSYCH 280	PSYCH CHILDHOOD&ADOL	3.00	3.00	A	12.000
SPAN 300	SPANISH III	5.00	5.00	A	20.000

TERM GPA : 4.000	TERM TOTALS : 17.00	17.00	68.000
CUM GPA : 4.000	CUM TOTALS : 51.00	80.00	204.000
SEMESTER HONORS			

SPRING 2020

COURSE	TITLE	ATT	EARNED	GRD	POINTS
ENGL 362	BRITISH SURVEY 2	3.00	3.00	A	12.000
ENGL 660	RDG/IN MAJOR AUTHORS	3.00	3.00	A	12.000
COURSE TOPIC(S): TOP/ANONYMOUS					
MUSIC 170	HISTORY OF ROCK & ROLL	3.00	3.00	A	12.000
SPAN 301	SPANISH IV	4.00	4.00	A	16.000

TERM GPA : 4.000	TERM TOTALS : 13.00	13.00	52.000
CUM GPA : 4.000	CUM TOTALS : 64.00	93.00	256.000
SEMESTER HONORS			

FALL 2020

COURSE	TITLE	ATT	EARNED	GRD	POINTS
BIOCH 110	BIOCHEM AND SOCIETY	3.00	3.00	A	12.000
BIOCH 111	BIOCH/SOCIETY LAB	1.00	1.00	A	4.000
ECON 110	PRIN/MACROECONOMICS	3.00	3.00	A	12.000
ENGL 390	FABLE AND FANTASY	3.00	3.00	A	12.000
ENGL 660	RDG/IN MAJOR AUTHORS	3.00	3.00	A	12.000

* * CONTINUED ON NEXT PAGE * *

STUDENT NAME	STUDENT NUMBER	DATE PREPARED	PAGE
MAKAELA BREANNE STEVENS	XXX-XX-XXXX	02/09/2023	2 OF 2
BIRTH DATE	ACADEMIC PROGRAM	ACADEMIC PLAN	ACADEMIC SUBPLAN
06/28/YYYY	AS UNDERGRADUATE DEGREE	ENGLISH MAJOR	LITERATURE TRACK
	UG UNDERGRADUATE NON DEGREE	PRE-LAW MAJOR	
		UNIVERSITY HONORS PROGRAM-N MAJOR	
	BA UNDERGRADUATE NON DEGREE	BUSINESS MINOR	
	AS UNDERGRADUATE NON DEGREE	JOURNALISM & MASS COMM MINOR	

* * CONTINUED FROM PREVIOUS PAGE * *

FALL 2020

COURSE TOPIC(S): TOP/PULLMAN

COURSE	TITLE	ATT	EARNED	GRD	POINTS
MC 110	MASS COMM IN SOCIETY	3.00	3.00	A	12.000
TERM GPA : 4.000		TERM TOTALS :	16.00	16.00	64.000
CUM GPA : 4.000		CUM TOTALS :	80.00	109.00	320.000
SEMESTER HONORS					

SPRING 2021

COURSE	TITLE	ATT	EARNED	GRD	POINTS
ENGL 476	AMERICAN ENGLISH	3.00	3.00	A	12.000
ENGL 599	SPEC RES/ENGLISH	3.00	3.00	A	12.000
ENGL 650	RDG/20& 21C AMERICAN LIT	3.00	3.00	A	12.000
COURSE TOPIC(S): TOP/1910-1940					
ENGL 703	CRIT APPR CHILD LIT	3.00	3.00	A	12.000
GEOL 102	EARTH THROUGH TIME	3.00	3.00	A	12.000
TERM GPA : 4.000		TERM TOTALS :	15.00	15.00	60.000
CUM GPA : 4.000		CUM TOTALS :	95.00	124.00	380.000
SEMESTER HONORS					

UNDERGRADUATE CAREER TOTALS

	ATT	EARNED	POINTS
UGRD CUM GPA: 4.000 CUM TOTALS :	95.00	124.00	380.000

- - - - - DEGREES AWARDED - - - - -

DEGREE BACHELOR OF ARTS

CONFER DATE 05/13/2022

DEGREE HONORS : SUMMA CUM LAUDE

PLAN ENGLISH

SUB-PLAN LITERATURE TRACK

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U.S. Department of Justice

Kate Brubacher
United States Attorney
District of Kansas

May 1, 2023

To Whom it May Concern:

My name is Jabari Wamble, and I am an Assistant United States Attorney for the District of Kansas and I also serve as the district's intern coordinator. This past summer our office had the good fortune to have Makaela Stevens work as a summer intern for the civil and criminal divisions in our Kansas City office.

During her internship with our office, Makaela was an extremely hard worker who quickly came up to speed in the matters to which she was assigned. Although uncompensated for her volunteer work, Makaela arrived early and often stayed late in order to complete her projects. Makaela's research and writing skills are exceptional as evidenced by the fact that her written work was filed in federal district court without revision.

During her time with us, Makaela assisted in preparing complex criminal cases for trial, including preparing an analysis in connection with a unique battle of experts concerning historical GPS data and analyzing multifaceted evidence and its relation to current circuit caselaw. Makaela also provided helpful research for civil AUSAs on some fairly obscure and complex areas of the law, including drafting motions in limine. Makaela also assisted in organizing discovery in an employment discrimination case in preparation for depositions. A number of our AUSA's are former federal district court and appellate clerks, and they viewed Makaela's legal abilities and work product as some of the best our office has ever seen from an intern.

Makaela's contributions to the USAO were greatly appreciated and demonstrated her ability to understand the complexities of our diverse practice. Makaela possesses poise and maturity well past her years. In addition to her superb research and writing skills, it was always a pleasure to work with Makaela. You are welcome to contact me to discuss any questions that you may have about Makaela or this recommendation.

Best regards,

Jabari B. Wamble

Assistant United States Attorney
District of Kansas



April 10, 2023

Dear Judge:

It is my pleasure to offer this letter of recommendation on behalf of Makaela Stevens, who has applied for a judicial clerkship position following her graduation from law school in 2024. I know Makaela primarily through my Administrative Law Class, in which she was a very strong student, and through her law review comment on the “psychological parent” doctrine. As a result of these interactions, I have come to think very highly of Makaela and her work. I believe she will be a great judicial clerk, and I urge you to offer her a position.

As reflected in her resume, Makaela has an outstanding law school record. Based on her stellar undergraduate work, she came to the University of Kansas School of Law on a Rice Scholarship, which is the most competitive and prestigious merit scholarship that the law school offers. Since arriving at the law school, she has exhibited exceptional promise to be a truly outstanding member of the legal profession. Academically, her grades have been consistently high and she was selected to the law review, where she became an articles editor and her comment was selected for publication.

Although Makaela has an excellent academic record, what truly stands out is her professional engagement. In addition to her academic responsibilities and her duties for the law review, Makaela found time to work in both the guardianship assistance program and the expungement clinic, earning recognition from the law school for her pro bono activity. She is also active in several student organizations. Last summer she gained experience in the U.S. Attorney’s Office in Kansas City, a unique and prestigious opportunity to participate in the practice of law at the highest level. These achievements are all the more impressive in light of Makaela’s participation in the “LEAD” program, through which she started law school after three years of undergraduate work and combined the first year of law school with the completion of her undergraduate degree.

My own experience with Makaela confirms her academic ability and professional engagement. First, Makaela was a great student in my administrative law class, in which she did very well in a class of especially strong students. Administrative Law is a course that requires many skills that translate well to a judicial clerkship setting. Students must be comfortable with complex procedures and extensive procedural histories, they must quickly absorb new statutes and regulatory regimes so as to understand cases that present administrative law issues involving different agencies and organic statutes, and they become familiar with concepts like standards of review and standing. So I think Makaela’s strong performance in the course is also an indicator of her ability to fulfil the responsibilities of a judicial clerk at the highest level.

Recommendation Letter for Makaela Stevens

April 10, 2023

Page 2

As I teach the course, moreover, I have the opportunity to work closely with individual students in a series of small group exercises. The small group exercises place three or four students onto a team (with a different team for each exercise) and puts the team into a professional role with assigned tasks in connection with a recent administrative proceeding or administrative law case. They meet as a group to prepare and then meet with me to discuss the issues and consider the best approach to achieve the client's goals. Finally, each student sends me a written summary of the meeting. This method allows me to get a pretty good sense of individual students, how well they understand the material, and their ability to engage with it effectively as lawyers. Makaela really shone in this aspect of the course—she was always prepared for the meetings, offered valuable insights, and wrote strong and accurate summaries of the meetings.

I was also very impressed with Makaela's comment for the law review, which considered the "psychological parent" doctrine in relation to adoptions in Kansas. This doctrine provides a means through which courts and agencies may consider the attachments of a child to prospective adoptive parents. The doctrine is potentially significant in those difficult cases when courts and agencies must decide whether to place a child in foster care for adoption with the foster parents or with the child's relatives. Traditionally, there has been a preference for placement with relatives, but there is increasing recognition that this preference may be contrary to the best interest of the child if it disrupts healthy attachments to caregiving adults. Makaela's comment was thoroughly researched, the analysis was crisp and thoughtful, and she made her case well. As I am sure you know, this sort of research and writing is also an essential prerequisite for working in chambers, and her comment stands as further evidence that Makaela's is a perfect fit for a position as a judicial clerk.

My involvement with Makaela's comment also gave me an opportunity to observe her professional engagement firsthand. I serve on an advisory committee of the Kansas Judicial Council, an agency of the judicial branch that supports the administration of justice. The advisory committees study particular topics at the request of legislators in the state and recommend nonpartisan legislation to address various legal issues. This fall, my advisory committee was asked to study the issue of attachment in proceedings to determine the placement of foster children for adoption. Legislators were especially concerned that child welfare agencies were automatically placing children for adoption with relatives, even when the children had formed strong attachments to foster parents and had never met the relatives in question. I was aware that this topic overlapped with the topic of Makaela's law review comment, so I mentioned the committee's work to her one day in Administrative Law and let her know that the committee's monthly meetings were open to the public. Makaela sought out the research attorney managing the meetings so that she could attend all the meetings and receive all the materials provided to and prepared by the committee. None of this was necessary, but Makaela recognized the opportunity for professional engagement and put forth the effort to truly benefit from it.

As a final note, I think Makaela's personal story is also significant. She grew up in a small Kansas town, and is the first in her family to go to law school. She set her sights on becoming a member of the legal profession as an undergraduate and excelled. As a result she

Recommendation Letter for Makaela Stevens

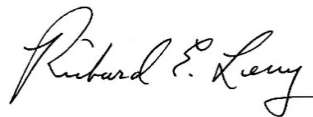
April 10, 2023

Page 3

was able to enter law school early on a full merit scholarship. She has pursued her own professional growth and training with great diligence and perseverance. Becoming a judicial clerk is, for Makaela, the next essential step in her professional journey. In other words, Makaela wants to be a clerk for all the right reasons—to better understand the legal process and the legal system, to contribute to the administration of justice and assist the important work of the judiciary, and to learn from her judge's experience and wisdom. I would also add that Makaela would be a welcome addition to any chambers—she interacts well with others and works effectively in collaborative settings. I have consistently found her to be kind, thoughtful, and well spoken.

In sum, I strongly recommend Makaela for a position as your clerk. If I can provide any further information or if you have any questions, please do not hesitate to contact me. I am available by email or telephone as indicated below.

Sincerely,



Richard E. Levy
J.B. Smith Distinguished Professor of Constitutional Law
University of Kansas School of Law
Tel.: (785) 864-9220
Email: rlevy@ku.edu

June 14, 2023

Dear Judge Walker:

I am an Assistant United States Attorney for the District of Kansas. I am also the Civil Chief for the United States Attorney's Office in Kansas. During the summer of 2022 our office had the good fortune to have Makaela Stevens work as a summer intern. Makaela is applying for a clerkship with your office.

During her internship with our office, Makaela was an extremely hard worker who quickly grasped the complexities of our office's civil and criminal practice. Although uncompensated for her volunteer work, Makaela always arrived at the scheduled time and completed the projects to which she was assigned in a timely manner. Makaela was regarded as a trusted member of the staff and her research and writing skills are excellent.

Although Makaela worked on a number of projects during her time with us, her most notable contributions were to an employment discrimination case titled *Laber v. Department of Defense*. In that case, a pro se plaintiff applied for 32 jobs with the DOD from California to Israel and believed his non-selection for those positions was due to his age, religion, gender (even when a male was selected for the position), and prior EEO activity. Makaela worked on many projects in that case including the successful motion for partial summary judgment that whittled the case down to one failure to hire claim. During the trial in February 2023, Makaela's work on motions in limine persuaded Judge Broomes to exclude from evidence a statement allegedly made to the plaintiff by an unknown employee of the DOD over 20 years ago.

Makaela's contributions to the United States Attorney's Office were greatly appreciated during a time that the Civil Division had a large volume of major defensive cases and was preparing for four trials set for February 2023. In addition to her excellent research and writing skills, it was always a great pleasure to work with Makaela. Based upon my own experience as a law clerk for the Kansas Court of Appeals Central Research Staff (1989-1990) and for Federal District Judge Sam Crow (1990-2000), I am confident that Makaela would be an excellent law clerk in your chambers.

You are welcome to contact me to discuss any questions that you may have about Makaela or this recommendation. My direct telephone number is 913-551-6684.

Best regards,

s/Christopher Allman
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**When the Child Adopts the Parent: Considering Attachment and the Psychological Parent
Doctrine in Kansas Adoptions**

Name: Makaela Stevens

1/31/2023

I wrote this Comment for publication in the Kansas Law Review when I served as a Staff Editor during the 2022-23 school year. This draft has not yet been edited for publication, so the work is entirely my own. The contents have been paired down to the introduction and a portion of the analysis section, though the Table of Contents shows the entirety of the Comment. This Comment has been selected for publication next year in Volume 72 of the Kansas Law Review.

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I. INTRODUCTION

Consider the following scenario: a child resides in foster care from birth through age three.¹ After learning to talk, she refers to her foster mother as “Mommy” and her foster mother’s biological son as her “brother.” Her foster home is the only home she has ever known, and she is stable, thriving, and happy. Eventually, the child’s biological parents relinquish their parental rights, and the foster parents file for adoption. At this point, the child’s biological aunt and uncle come forward seeking adoption as well. They have never met the child, nor shown interest in her wellbeing during her years in foster care. If the families have equal ability to care for the child, the court must decide whether relative or foster family adoption is in the child’s best interests.

Courts approach this complicated situation through two possible scenarios. In one scenario, the court recognizes that the child’s attachments to her foster family make her foster parents her psychological parents.² The foster family adopts the child, and because her attachments continue, the child is well-adjusted in adulthood and forms healthy relationships. In the second scenario, the court does not view the foster parents as psychological parents. The aunt and uncle adopt the child, and she loses contact forever with her foster family. She is in a new home and a new daycare, with new parents, siblings, and teachers. The child may adjust properly and live a fulfilling life with her biological relatives. But it is more likely that losing her original attachments will cause her difficulties in adjusting to her new home and family and cause her to struggle later in life.³ If this case enters a Kansas court tomorrow, the outcome is uncertain.

Kansas should consider the psychological parent doctrine in the adoption “best interests” analysis for foster parents. Existing Kansas law supports including the psychological parent doctrine for three reasons. First, foster parents often fall squarely within common definitions of the psychological parent.⁴ Second, Kansas caselaw recently moved toward recognizing the psychological parent doctrine in custody cases.⁵ Third, this movement can extend to foster parents because Kansas custody legislation interacts with and informs Kansas adoption legislation.⁶

Kansas law can also improve to solidify the psychological parent doctrine. First, improved search and notice requirements for relatives could control whether children form attachments to relatives or to

foster parents.⁷ Second, codifying adoption “best interests” factors could help courts and agencies make more consistent and guided adoption decisions.⁸ The child in the scenario faces a more certain outcome if courts and practitioners recognize existing support for the psychological parent doctrine in current Kansas law and implement the suggested changes to Kansas legislation.

II. [BACKGROUND SECTION OMITTED]

III. ANALYSIS

Kansas should consider the psychological parent doctrine in the adoption “best interests” analysis involving foster parents. This Comment will first argue that existing Kansas law supports the psychological parent doctrine in the adoption “best interests” analysis for three reasons. First, foster parents often fall squarely within common psychological parent definitions. Second, Kansas recently moved toward recognizing the psychological parent doctrine in custody cases. Third, this caselaw can extend to foster parents because Kansas custody legislation interacts with and informs Kansas adoption legislation affecting foster parents. This Comment will then argue that existing Kansas law can change to solidify the psychological parent doctrine and ensure that a child’s attachments receive consideration during adoption proceedings. Improved relative searches and notification, along with codifying adoption “best interests” factors, would reach this goal.

A. *Existing Kansas Law Supports Including Consideration of the Psychological Parent Doctrine in the Adoption “Best Interests” Analysis.*

Existing Kansas law supports the psychological parent doctrine. First, foster parents often fall within the common psychological parent definitions used in other states. Second, Kansas custody legislation informs and interacts with the Kansas adoption legislation applied to foster parent adoptions. Lastly, Kansas courts recently moved toward recognizing the psychological parent doctrine in custody cases. Because of the similarities between Kansas custody legislation and Kansas adoption legislation, the Kansas Supreme Court’s move toward recognizing the doctrine in custody cases should also apply to adoption cases.

1. Applying the Psychological Parent Doctrine to Foster Parents

Foster parents can be psychological parents because they fall squarely within the psychological parent definitions provided by courts that recognize the doctrine, as illustrated by the definitions discussed below.

First, the psychological parent definition in the second factor of *Clifford K.*⁹ fits foster parents. This factor considers whether the nonparent, on a “continuing day-to-day basis [provides] interaction, companionship, interplay, and . . . fulfills the child’s psychological needs for a parent,” as well as the child’s physical, emotional, and financial needs.¹⁰ A foster parent who cares for a child for a long time falls within this definition. When a child enters a foster parent’s home, the foster parent takes on all parenthood obligations by meeting the child’s emotional, physical, and financial needs. The child resides in the foster parent’s home, and the foster parent provides the child with interaction and companionship, making that foster parent a psychological parent.

Second, the psychological parent definition used in Colorado applies to foster parents,¹¹ as well as the third factor in *Clifford K.*¹² The Colorado definition states that the psychological parent is someone who has “deep emotional bonds such that the child recognizes the person, independent of the legal form of the relationship, as a parent from whom they receive daily guidance and nurturance.”¹³ The third *Clifford K.* factor considers whether there is a “significant relationship between a child and an adult, who may be, but is not required to be, related to the child biologically or adoptively.”¹⁴ Because foster parents provide daily guidance and nurturance to satisfy a child’s needs, deep emotional bonds and significant relationships form. The bonds between foster parents and children form regardless of blood connections or legal recognition of the relationship. Because of these bonds, a foster parent can be a psychological parent.

Third, foster parents can be psychological parents because there is risk that a child will suffer emotional harm if they lose their attachment to a foster parent. Courts acknowledge that the psychological parent definition involves whether there is such a risk to the child if the psychological parent-child relationship ends.¹⁵ If a foster parent has a significant emotional relationship with a child, it follows that

severing that relationship could cause the child immediate emotional harm, and that this foster parent is therefore a psychological parent.

Including foster parents in the psychological parent definition would not only protect a child from immediate emotional harm, but also protect a child's life and relationships as they later navigate the adult world. Research shows that severing an attachment can cause a child difficulty in forming healthy relationships, distrust and fear of loved ones, and attachment disorders, as well as higher risks of mental health problems, criminal activity, homelessness, and poverty.¹⁶ The way to keep the next generation of adults from struggling is to address the issue now, while they are children, by protecting their vital attachments. Including foster parents in the psychological parent definition acknowledges the importance of that attachment relationship, not only to a child's present emotional well-being, but also their adult life and relationships.

Lastly, a foster parent fits the psychological parent definition when a foster parent fulfills that role from the child's perspective for a significant period of time.¹⁷ *In re J.M.P.*¹⁸ and *In the Interest of E.L.M.C.*¹⁹ include foster parents in the psychological parent definition in situations when the foster parent cared for a child over a significant period of time. Both cases also emphasize the child's perspective. In *In re J.M.P.*, the Louisiana Supreme Court defined a psychological parent as "an adult who has a psychological relationship with a child from the *child's* perspective."²⁰ Similarly, *In the Interest of E.L.M.C.* defined the psychological parent as someone who has a bond with a child such that "the child recognizes the person . . . as a parent from whom they receive daily guidance and nurturance."²¹ The U.S. Supreme Court acknowledged the logical connection between a lengthy stay with a foster parent and the child's perspective of that foster parent, stating that "[w]here a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family."²² Further, the U.S. Supreme Court emphasized that foster families are not a "mere collection of unrelated individuals" after a long period of time passes and relationships form.²³

As suggested by the U.S. Supreme Court, the idea of child time also applies to the child's perspective of their foster parent.²⁴ To a child, a year's time seems much longer than it seems to an adult.²⁵ Further, that year spent living with a foster parent could make up a child's entire life thus far. Based on child time and the Court's definitions, a foster parent fits the psychological parent definition when the child sees them as a psychological parent. This bar is often met when a foster parent provides daily guidance, socialization, and nurturance to a child for many years, or alternatively, for the child's entire young life. Because the above psychological parent definitions can apply to foster parents, if Kansas included the psychological parent doctrine in the adoption "best interests" analysis, children's attachments to their foster parents would be better protected.

2. Connections Between Kansas Custody Legislation and Kansas Adoption Legislation

Kansas custody legislation informs and interacts with the Kansas adoption legislation that is applied to foster parent adoptions. The two pieces of legislation connect through similar language, procedures, and their overall goal. Because of their connections, their "best interests" analyses, while currently dissimilar, should inform each other.

It makes sense to compare and connect Kansas adoption legislation and Kansas child custody legislation because they use similar language and procedures, and focus on the same goal. That goal is to place children in homes that are in their "best interests."²⁶ In the adoption statutes under the Kansas Code for Care of Children, after parental rights termination, the court may order a child's adoption.²⁷ The court must give placement preference "to the extent that the court finds it is in *the best interests of the child*" when making this order.²⁸ Similarly, the first statute in the Kansas Family Law Code regarding custody says that "[t]he court shall determine legal custody, residency and parenting time of a child in accordance with *the best interests of the child*."²⁹

The statutes' language is also similar when determining who should receive adoptive or custodial preference. The adoption statute, K.S.A. § 38-2270(b), says that when making an adoption order, the court must give preference "first to . . . a relative of the child and second . . . to a person with whom the child has close emotional ties."³⁰ Similarly, the custody statute, K.S.A. § 23-3207(c)(2), says that when making a

custodial residency order, the court must give preference “first to . . . a relative of the child by blood, marriage or adoption and second . . . to another person with whom the child has close emotional ties.”³¹ It makes sense that the two pieces of legislation are linguistically similar and oriented toward the same goal, because both address the same complicated and painful situation: placing children, whose natural homes and families are disrupted, into homes and families where they will live safe and stable lives. Whatever constitutes a child’s best interests will not differ based on whether the child is enduring their parents’ divorce or their adoption out of foster care. This legislation is similar and connected because all children, regardless of their case’s specific facts, deserve a home where they are safe and around adults to whom they are securely attached.

When comparing the two sets of statutes, one could arguably conclude that the adoption legislation and the custody legislation are strongly connected, simply due to their similar language and goals. The statutes connect further, however, through the procedure they employ. The custody statutes under the Kansas Family Law Code feed procedurally into the Child in Need of Care (CINC) and adoption statutes under the Kansas Code for Care of Children. Within the Kansas Family Law Code, the court considers whether a child is a CINC multiple times, including after determining who the child’s legal parents are³² and after officially determining legal custody.³³ At these points, if the child is adjudicated as a CINC, the case moves from Kansas Family Law Code custody territory into Kansas Code for Care of Children adoption territory, where the case will go through the full CINC process.³⁴

It is therefore possible that a child whose case begins under Kansas custody legislation could find themselves under Kansas adoption legislation at some point. This is an important consideration because while Kansas custody legislation and adoption legislation have the same stated goal, the “best interests of the child,” the means used to determine those best interests are different, depending on whether the case is within the Kansas Family Law Code or the Kansas Code for Care of Children. The “best interests” analyses differ because the Kansas legislature has codified specific factors for courts to use in determining who should receive legal custody of a child, but there are no such factors for courts to use when determining who should get to adopt a child.³⁵ Arguably, then, a child’s “best interests” determination under Kansas

custody legislation could come to an entirely different result if that same child's best interests were determined under Kansas adoption legislation. Because these pieces of legislation are linguistically and procedurally connected, and share the same end goal, there is value in considering them alongside each other and allowing them to inform each other in their "best interests" analyses.³⁶

3. The Psychological Parent Doctrine in Kansas Caselaw

The Kansas Supreme Court recently moved toward recognizing the psychological parent doctrine in custody cases. Because of the similarities between Kansas custody legislation and adoption legislation, the move toward the psychological parent doctrine should apply to adoption cases as well. Kansas legislation explicitly limits the parent-child relationship to biological or adoptive relationships.³⁷ However, the Kansas Supreme Court found an exception to the statute through cases involving same-sex couples who decided to have children together, deeming the non-biological partners "de facto" parents.³⁸ The exception allows individuals to be considered a child's legal parent without biological or adoptive ties. Psychological parents, including foster parents, also fall within this exception. The exception contains two components: a psychological component and a contractual component. These components and the "de facto" parent designation as a whole are discussed in turn to illustrate how psychological parents and foster parents fit into the new exception, as well as ways that they may not fit.

i. *The Psychological Component and the Contractual Component*

Kansas's recognized exception can extend to psychological parents, including foster parents, because the exception's psychological component is often found in foster parent adoption scenarios. In *Frazier*, the non-biological partner's relationship to the children rested first on a psychological attachment to the child.³⁹ Foster parents, like non-biological partners, have no blood relationship to the child they raised. However, they often have a strong psychological relationship with the child. The psychological attachment between a child and their foster parent versus between a child and their birth mother's non-biological partner is often no different in the child's eyes. The child views this individual as someone who cared for them, protected them, played with them, and laughed with them throughout their life. Whether

the relationship formed through the foster care system or because the child's mother brought the partner into the child's life does not change the quality or the importance of the attachment relationship to the child.

Kansas's recognized exception can extend to psychological parents, including foster parents, because the exception's contractual component also exists in foster parent adoption scenarios. The non-biological partner's relationship to the children in *Frazier* rested second on a contractual understanding with the birth mother that she and the non-biological partner would raise the children together. The Kansas Supreme Court in *In re Parentage of M.F.* clarified that *Frazier* did not require any form of written or oral contract to consider a non-biological partner the child's legal parent—only a showing that the birth mother intended to share her parenting rights.⁴⁰ Similarly, a foster parent's connection to the child rests on a contractual understanding with the State that the foster parent will serve as a caregiver to the foster child.⁴¹ When a child enters foster care, the State takes on a parental role, in that it makes decisions for the child, such as which foster family the child will be placed with.⁴² Arguably, the State intends to share its “parenting” rights with the foster family it chooses, just like the biological mothers in *In re Parentage of M.F.* and *Frazier* intended to share their parenting rights with their partners. The exception, therefore, extends to psychological parents and foster parents because of the psychological relationship between a foster parent and child, and because of the contractual aspect of the State placing the child in foster care.

ii. *The “De Facto” Parent Designation*

Psychological parents, including foster parents, also fit within the larger category of “de facto” parents created by the Kansas Supreme Court in *Frazier*, which allows an individual to bring an action to establish that a parent-child relationship exists. In *Frazier*, the court created this category by holding that males and females alike can make a presumptive parenthood claim without the adoptive or biological ties that create the parent-child relationship in K.S.A. § 23-2208.⁴³ The court first looked to K.S.A. § 23-2220, which says that laws specifically encompassing mother and child relationships also incorporate provisions applicable to father and child relationships.⁴⁴ This connection between maternity and paternity statutes allowed the Kansas Supreme Court to create a *maternity* presumption because a statutory *paternity* presumption already existed under K.S.A. § 23-2208.⁴⁵ According to K.S.A. § 23-2208, a man need only

notoriously or in writing recognize his paternity to be considered a child's presumptive legal parent.⁴⁶ Because of the creation of the maternity presumption, to be considered a "de facto" parent, a woman also need only notoriously or in writing recognize her maternity of a child, along with the shown intention of the biological parent to share their parenting rights, as clarified in *In re Parentage of M.F.* The presumptive parent and "de facto" parent designations, according to *Frazier*, allow individuals to bring an action to establish a parent-child relationship.

A psychological parent or foster parent, arguably, could also invoke this parenthood presumption, regardless of biological ties, and bring an action to establish the existence of a legal parent-child relationship without adoptive or biological ties. As discussed previously, foster parents can fit within the statutory parent-child relationship exception. Because the "de facto" designation does not require biological ties, as recognized in the non-biological partner cases, a foster parent who is a psychological parent could also bring a claim to establish legal parentage through the maternity or paternity presumptions.

iii. *Differences Between Non-Biological Partners and Foster Parents*

Though similar in some ways, non-biological partners and foster parents do differ. First, the Kansas Supreme Court in *In re Parentage of M.F.* and *In re Parentage of W.L.* focused less on the relationship between the child and the non-biological partner, and more on the adults' agreement as to who held rights to the child.⁴⁷ This undermines Kansas's move toward the psychological parent doctrine, because it suggests that a child's attachments are irrelevant as long as adults came to an agreement when the child was born. At the same time, however, ignoring attachment in favor of adults' agreements is in no way considering the child's best interests.

Second, applying the statutes to allow a maternity or paternity presumption in the way that the Kansas Supreme Court has interpreted would open the door for any individual with an interest in adopting a child to come forward and make a notorious or written claim to maternity or paternity. Limiting the presumption to cases where the parent is still involved and able to consent to sharing their due process rights with another person would prevent this outcome. However, codifying specific "best interests" factors would protect children against claims of parenthood by non-parents. Codifying "best interests" factors will

be discussed later on,⁴⁸ but these protective factors could include considering whether the individual and the child lived in the same household and whether the individual assumed obligations of parenthood.⁴⁹ A foster parent who cared for a child for a significant period would satisfy factors like these, while individuals such as neighbors, babysitters, nannies, and family friends likely would not.

In sum, existing Kansas law supports the psychological parent doctrine. First, foster parents often fall within the common psychological parent definitions used in other states. Second, Kansas courts recently moved toward recognizing the psychological parent doctrine in custody cases. Lastly, Kansas custody legislation informs and interacts with Kansas adoption legislation, so the Kansas Supreme Court's move toward recognizing the doctrine in custody cases should also apply to adoption cases. This Comment next turns toward ways that existing Kansas Law can change to better support the psychological parent doctrine in foster parent adoptions.

B. [Section B Omitted]

IV. [CONCLUSION OMITTED]

¹ This scenario is based on the personal account of Jessica and Jason Drahota, used as written testimony in support of House Bill 2700. Proponent Testimony House Committee on Children and Seniors, H.B. 2700, 2022 Session, Attachment 14 (Kan. 2022), http://kslegislature.org/li/b2021_22/committees/ctte_h_children_and_seniors_1/documents/testimony/202216_14.pdf.

² See *infra* Section II.A.

³ James Kenny, *Bonding in the Child Placement Process*, ADOPTION IN CHILD TIME (Jan. 10, 2016), <https://adoptioninchildtime.org/updates/bonding-in-the-child-placement-process>.

⁴ See *infra* Section III.A.1.

⁵ See *infra* Section III.A.3.

⁶ See *infra* Section III.A.2.

⁷ See *infra* Section III.B.1.

⁸ See *infra* Section III.B.2.

⁹ Clifford K. v. Paul S. ex rel., 217 W. Va. 625, 642 (2005); see *supra* notes 27–30.

¹⁰ *Id.*; see *supra* notes 27–30.

¹¹ In the Interest of E.L.M.C., 100 P.3d 546, 559 (Colo. Ct. App. 2004).

¹² Clifford K., 217 W. Va. at 643; see *supra* notes 27–30.

¹³ In the Interest of E.L.M.C., 100 P.3d at 559.

¹⁴ Clifford K., 217 W. Va. at 643; see *supra* notes 27–30.

¹⁵ In the Interest of E.L.M.C., 100 P.3d at 560; Adoption of Eamon, No. 20-P-900, 2021 WL 2309644, at *14 (Mass. App. Ct. June 7, 2021).

¹⁶ James Kenny, *Bonding in the Child Placement Process*, ADOPTION IN CHILD TIME (January 10, 2016), <https://adoptioninchildtime.org/updates/bonding-in-the-child-placement-process>.

¹⁷ See *supra* notes 67–68.

¹⁸ 528 So. 2d 1002, 1013 (La. 1988).

¹⁹ In the Interest of E.L.M.C., 100 P.3d at 559.

²⁰ In re J.M.P., 528 So. 2d at 1013.

²¹ In the Interest of E.L.M.C., 100 P.3d at 559.

²² Smith v. Org. of Foster Fams. for Equal. & Reform., 431 U.S. 816, 844 (1977).

²³ *Id.*

²⁴ See *supra* Section II.C; see also In the Interests of M.S., 56 Kan. App. 2d 1247, 1254 (2019); Kan. Stat. Ann. § 38-2201(b)(4) (2022).

²⁵ In the Interest of J.S., No. 120,193, 2019 WL 1967952, at *10; see also *supra* Section II.C.

²⁶ Kan. Stat. Ann. § 38-2270 (2022) (“court shall give preference, to the extent that the court finds it is in the best interests of the child . . .”); Kan. Stat. Ann. § 23-3201 (2022) (“The court shall determine legal custody, residency, and parenting time of a child in accordance with the best interests of the child.”).

²⁷ Kan. Stat. Ann. § 38-2270 (2022).

²⁸ Kan. Stat. Ann. § 38-2270(b) (2022) (emphasis added).

²⁹ Kan. Stat. Ann. § 23-3201 (2022) (emphasis added); Additionally, the factors codified to help courts determine who should receive legal custody of a child take the child’s best interests into account, specifically with the factor that considers “the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child’s best interests.” Kan. Stat. Ann. § 22-3203 (2022).

³⁰ Kan. Stat. Ann. § 38-2270(b) (2022).

³¹ Kan. Stat. Ann. § 23-3207 (2022).

³² Kan. Stat. Ann. § 23-2215 (2022).

³³ Kan. Stat. Ann. § 23-3207 (2022).

³⁴ This process involves notifying relatives, determining placement, and attempting reintegration until it is no longer viable, followed by parental rights termination and consideration of adoption. Kan. Stat. Ann. §§ 38-2271, 38-2269, 59-2136 (2022).

³⁵ *See infra* III.B.2.i.

³⁶ *Id.*

³⁷ Kan. Stat. Ann. § 23-2205 (2022).

³⁸ *See generally* Frazier v. Goudschaal, 296 Kan. 730 (2013); In re Adoption of T.M.M.H., 307 Kan. 902 (2018); In re Parentage of M.F., 312 Kan. 322; In re Parentage of W.L., 312 Kan. 367.

³⁹ *Frazier*, 296 Kan. at 753.

⁴⁰ In *In re Parentage of M.F.* and *In re Parentage of W.L.*, the Kansas Supreme Court added a required showing that a birth mother intended to share her parenting rights with a non-biological partner. *In re Parentage of W.L.*, 312 Kan. at 381–82. This requirement is also satisfied in foster parent adoption cases. When it comes time for the child’s adoption, the biological parents’ rights must have either been relinquished or terminated. K.S.A. §§ 38-2271, 38-2269, 59-2136. Because of the termination or relinquishment of rights, the parent’s due process rights are not violated if a foster parent claims presumptive paternity.

⁴¹ Kan. Stat. Ann. § 38-306 (2022).

⁴² Kan. Stat. Ann. § 38-2243(g)(2) (2022).

⁴³ Kan. Stat. Ann. § 23-2208 (2022).

⁴⁴ Kan. Stat. Ann. § 23-2220 (2022).

⁴⁵ Kan. Stat. Ann. § 23-2208 (2022); *Frazier*, 296 Kan. at 747.

⁴⁶ Kan. Stat. Ann. § 23-2208 (2022).

⁴⁷ *In re Parentage of W.L.*, 312 Kan. 367, 381–82 (2020).

⁴⁸ See *infra* Section III.B.2.

⁴⁹ *In the Interest of E.L.M.C.*, 100 P.3d 546, 560 (Colo. Ct. App. 2004).

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June 13, 2023

The Honorable Jamar Walker
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Dear Judge Walker,

I am a rising third-year student at The University of Alabama School of Law, and I am writing to express my interest in a clerkship in your chambers for the 2024-2025 term. During my time in law school, I have devoted my career to serving the public and I believe that my experiences have prepared me to serve your chambers as a clerk. Since I was a child, the importance of community has been instilled in me. From participating in clothing drives to volunteering all over my hometown, serving my community quickly became a foundational part of who I am. I came to law school to serve communities who have felt the harm of the legal system, particularly communities in the South. In pursuit of that goal, I have strived to learn all I can to be the best advocate for those whom I will serve. That is why I would love nothing more than to clerk in your chambers. A clerkship in your chambers would be training that I would be honored to receive as I strive to become the best attorney possible for my future clients.

During my time in law school, I have received numerous honors, including the inaugural John Paul Stevens Fellowship, the Capstone Legal Scholarship, and a high pass in my Legal Writing II course. I have also had several experiences that have furthered the development of my legal research and writing skills.

This upcoming year, I am serving as Editor in Chief of the *Alabama Civil Rights & Civil Liberties Law Review*, as well as a member of the Alabama Law Moot Court Board. I have been chosen to compete on the law school's tax moot court team in the Spring. Further, I was a member of the law school's 2022 Civil Rights and Liberties Moot Court Team, which placed as quarterfinalists and won the 3rd Best Brief Award in the Emory Civil Rights and Liberties Moot Court Competition. I will also serve as a Student Attorney in the law school's Criminal Defense Clinic this fall.

This past semester, I served as a judicial intern for Judge Theodore McKee on the United States Court of Appeals for the Third Circuit, where I learned extensively about what a judicial clerk does. I drafted two judicial opinions, wrote memos, attended oral arguments, and conducted legal research. I also discussed cases with Judge McKee and offered my thoughts on the various legal issues at hand in the case. This experience only solidified my desire to clerk after graduation. Working with Judge McKee and his chambers was a career-changing experience, and he is happy to discuss my work for him. He can be reached at Judge_theodore_mckee@ca3.uscourts.gov or 215-597-9601. During my first summer, I interned with the Capital Appeals Project, a Louisiana-based non-profit that serves individuals on Louisiana's death row. This summer, I am interning with the American Civil Liberties Union's Capital Punishment Project, where I also interned this past fall.

I am also deeply involved in extracurricular efforts at my law school. I am a law school ambassador, a member of the law school's Public Interest Student Board, as well as a devoted member of the Black Law Students Association.

A copy of my resume and my most recent transcript are enclosed. I have included a brief from one of my moot court competitions as a writing sample. Letters of recommendation from Professor Anita Kay Head, Professor Bryan K. Fair, and Cecelia Kappel of the Capital Appeals Project will be sent separately. Thank you for your consideration.

Respectfully,

Maya S. Stevenson

Maya S. Stevenson

201 Marina Drive, Apt. 0507, Tuscaloosa, Alabama, 35406 • 225.454.9795 • maya.stevenson@law.ua.edu

EDUCATION

The University of Alabama School of Law

Tuscaloosa, AL

Juris Doctor Candidate with Certificate in Public Interest, May 2024

- Editor in Chief, Vol. 15 of the *Alabama Civil Rights and Civil Liberties Law Review*
 - Associate Editor, Vol. 14 of the *Alabama Civil Rights and Civil Liberties Law Review*
- 2023-2024 Tax Moot Court Team
- Alabama Law Moot Court Board
- 2022 Civil Rights and Liberties Moot Court Team
 - Awarded 3rd Best Brief Award in the Emory Civil Rights and Liberties Moot Court Competition; Quarterfinalists
- **Honors/Awards:** Capstone Legal Scholarship (full-tuition scholarship plus stipend); BLSA Bar Prep Course Scholarship; John Paul Stevens Public Interest Fellowship (Inaugural Fellow); High Pass in Legal Writing II
- **Leadership:** The Appellate Project (2022-2023 Mentee); Law School Ambassador; American Constitution Society ('22- '23 Diversity Director); Anti-Trafficking Law Student Association (2L Rep); Black Law Students Association; National Lawyers Guild; Public Interest Student Board

Louisiana State University

Baton Rouge, LA

Bachelor of Arts: English, Philosophy, Minor in Leadership Development, May 2021

- **Honors/Awards:** Taylor Opportunity Program for Students Honors (full-tuition scholarship plus stipend); LSU Tiger Twelve Class of 2021 Honoree; LSU Office of Multicultural Affairs Lasting Legacy Award Recipient; Black Faculty and Staff Caucus Black Scholar Award; LSAC Plus Award Participant; LSU Office of Multicultural Affairs Excellence Awards for *Emerging Leader* and *Best New Initiative* for "Nubian-Made Event," Opinion Columnist of the Semester, Fall 2018
- **Leadership:** Tigers Against Trafficking (President, Communications Chair); Black Women's Empowerment Initiative (Event Chair); Domestic Violence Awareness Month Planning Committee; Leadership LSU Fall 2020 Cohort; Supermajority Education Fund Majority Leader; LSU Black History Month 2020 Committee; LSU Summer Scholars 2017
- **Publications:** *Featured in LSU 2017-2018 Diversity Impact Report; Featured in LSU Cornerstone Winter 2017/Spring 2018, "Summer Strong"*

EXPERIENCE

Criminal Defense Clinic, The University of Alabama School of Law

Tuscaloosa, AL

Student Attorney, Fall 2023

American Civil Liberties Union (ACLU)

Remote/Durham, NC

Summer Legal Intern, June 2023—Present

- Work with the Capital Punishment Project's legal team on projects that seek to end the death penalty on the national level through direct representation, strategic litigation, systemic reform, and public education/advocacy.
- Work on Racial Justice Act cases that attack racial discrimination on death row in California.
- Work on death jury qualification cases that consider racial discrimination among capital juries in states across the South.

Fall Legal Intern, September 2022—December 2022

- Worked on mitigation projects and assisted in the compilation of materials for ongoing trials.
- Compiled materials detailing the historical background of the death penalty within different jurisdictions.
- Assisted with discovery and investigation into legal misconduct in historical executions.

United States Third Circuit Court of Appeals

Remote/Philadelphia, PA

Judicial Intern for Judge Theodore McKee, January 2023—May 2023

- Researched and drafted non-precedential opinions in conjunction with law clerks.
- Wrote research memoranda along with discussing the legal analysis of ongoing cases with law clerks.
- Researched and consulted with Judge McKee on ongoing precedential cases, including the most recent employment case, *Johnson, et. al v. NCAA, et. al*.

Alabama Appleseed Center for Law and Justice

Remote/Montgomery, AL

Volunteer, January 2023—Present

- Assist in post-conviction research of individual cases in Alabama.
- Compile files with research and submit to supervisors for further investigation.

Capital Appeals Project/Promise of Justice Initiative

New Orleans, LA

Law Clerk, May – August 2022

- Worked under the Executive Director to perform research, analysis, and policy consideration regarding trial level, appellate, post-conviction, and federal habeas corpus matters.
- Worked on an ongoing capital trial within the Baton Rouge area, locating issues for appeal and supporting trial counsel.
- Conducted research regarding the impact of ongoing cases and decisions on current organizational caseloads.
- Assisted in writing briefs and motions submitted to federal and state courts.
- Organized client documents, clarified trial records, and assisted in investigation for cases.

Redemption Earned, Inc.

Remote/Birmingham, AL

Volunteer, February 2022 – December 2022

- Worked with Alabama's first program to aid incarcerated individuals in obtaining work release by resolving detainers through mailing forms to inmates to determine their eligibility.
- Monitored and reviewed forms and resolved any matters that would make the individual ineligible for work release.

Geo Prep Academies

Baton Rouge, LA

Teaching Assistant/Substitute, June 2021 – July 2021

- Worked with low-income students of color to improve their academic progress in English and Mathematics, through one-on-one work and teaching.
- Substituted for unavailable teachers, implemented lesson plans, taught the entire class, tracked progress, and created and reinforced progress.

Louisiana Department of Labor (Louisiana Workforce Commission)

Baton Rouge, LA

Student Worker, Office of Unemployment Insurance Appeals Tribunal, June 2018 - July 2021

- Assisted 500+ claimants weekly by researching, locating, and clarifying information regarding applicable employment statutes and codes.
- Docketed and filed appeals dealing with various unemployment statutes, such as overpayments or unemployment qualifications.

VOLUNTEER EXPERIENCE

West Alabama Food Bank (August 2021); Companion Animal Alliance: Volunteer (August 2019 – July 2021); Voter Empowerment Network (September 2020 – August 2021); Martin Luther King Jr. Day of Service (2018-2020)

Interests

Reading, Traveling, Live Music, Volunteering, Spending Time with Family and Friends



The University of Alabama

Tuscaloosa, Alabama 35487

OFFICIAL ACADEMIC TRANSCRIPT

SSN: ***-**-2946

Date of Birth: 20-MAR

Date Issued: 12-JUN-2023

Record of: Maya Stevenson
Issued To: MAYA STEVENSON
MSTEVENSON2@CRIMSON.UA.EDU

Page: 1

Course Level: Law

Current Program:
Juris Doctor

College : Law School
Major : Law

SUBJ NO.	COURSE TITLE	CRED	GRD	R	PTS				
Institution Information continued:									
LAW 645	Business Organizations	3.000	B						9.000
LAW 660	Legal Profession	3.000	B						9.000
LAW 731	Due Process Survey	2.000	B+						6.660
LAW 821	Public Interest Lawyering	2.000	A-						7.340
INSTITUTION CREDIT:									
Fall 2021									
Law School									
Law									
LAW 602	Torts	4.000	B						12.000
LAW 603	Criminal Law	4.000	B+						13.320
LAW 608	Civil Procedure	4.000	B						12.000
LAW 610	Legal Research/Writing	2.000	C						4.000
LAW 713	Intro to Study of Law	1.000	P						.000
Ehrs: 15.000 QPts: 41.320									
GPA-Hrs: 14.000 GPA: 2.951									
Good Standing									
Spring 2022									
Law School									
Law									
LAW 600	Contracts	4.000	B-						10.680
LAW 601	Property	4.000	B-						10.680
LAW 609	Constitutional Law	4.000	C+						9.320
LAW 648	Legal Research/Writing II	2.000	B-						5.340
LAW 742	Legislation and Regulation	2.000	B						6.000
Ehrs: 16.000 QPts: 42.020									
GPA-Hrs: 16.000 GPA: 2.626									
Good Standing									
Fall 2022									
Law School									
Law									
LAW 626	Mt Ct Competition Teams	2.000	P						.000
LAW 628	Consumer Protection	3.000	B+						9.990
***** CONTINUED ON NEXT COLUMN *****									
Institution Information continued:									
LAW 645	Business Organizations	3.000	B						9.000
LAW 660	Legal Profession	3.000	B						9.000
LAW 731	Due Process Survey	2.000	B+						6.660
LAW 821	Public Interest Lawyering	2.000	A-						7.340
Ehrs: 15.000 QPts: 41.990									
GPA-Hrs: 13.000 GPA: 3.230									
Good Standing									
Spring 2023									
Law School									
Law									
LAW 626	AL Law 2L Mt Ct Comp Class	1.000	P						.000
LAW 670	Federal Jurisdiction	3.000	B-						8.010
LAW 683	Administrative Law	3.000	B						9.000
LAW 753	Equal Protection Seminar	2.000	A-						7.340
LAW 790	Crim Procedure Trial	3.000	A-						11.010
LAW 795	Externship Program	3.000	P						.000
Ehrs: 15.000 QPts: 35.360									
GPA-Hrs: 11.000 GPA: 3.215									
Standing Undetermined									
Fall 2023									
IN PROGRESS WORK									
LAW 642	Evidence	3.000	IN PROGRESS						
LAW 644	Decedents Estates Trusts Plan	3.000	IN PROGRESS						
LAW 665	Clinical Program	2.000	IN PROGRESS						
LAW 665	Clinical Program	4.000	IN PROGRESS						
LAW 700	Appellate Advocacy	2.000	IN PROGRESS						
In Progress Credits									14.000
***** CONTINUED ON PAGE 2 *****									


K.H. Foshee
University Registrar



The University of Alabama

Tuscaloosa, Alabama 35487

OFFICIAL ACADEMIC TRANSCRIPT

SSN: ***-**-2946

Date of Birth: 20-MAR

Date Issued: 12-JUN-2023

Record of: Maya Stevenson
Level: Law

Page: 2

***** TRANSCRIPT TOTALS *****

INSTITUTION	Ehrs:	61.000	QPts:	160.690
	GPA-Hrs:	54.000	GPA:	2.976
TRANSFER	Ehrs:	0.000	QPts:	0.000
	GPA-Hrs:	0.000	GPA:	0.000
OVERALL	Ehrs:	61.000	QPts:	160.690
	GPA-Hrs:	54.000	GPA:	2.976

***** END OF TRANSCRIPT *****




K.H. Foshee
University Registrar

This transcript processed and delivered by Parchment



THE UNIVERSITY OF ALABAMA
Office of the University Registrar
Box 870134
Tuscaloosa, Alabama 35487-0134
(205) 348-2020
registrar@ua.edu
TRANSCRIPT GUIDE

The University of Alabama does not issue partial transcripts of a student's record.

ACADEMIC BANKRUPTCY - Academic Bankruptcy involves an undergraduate student's request to retroactively withdraw from one academic term due to extenuating circumstances. If granted, all courses taken during the term in question will be graded "W" (Withdrawn). No more than one petition for Academic Bankruptcy may be approved during a student's academic career at The University of Alabama. A notation regarding the Academic Bankruptcy will appear under the term in which the request was granted.

ACADEMIC SECOND OPPORTUNITY - Students who have been separated from The University of Alabama for at least three academic years may petition to apply for readmission through Academic Second Opportunity. If approved, all previous institutional academic work remains on the student's permanent record, but the grades for previous work are no longer used in computing the grade point average (GPA). Grades of "C-" or higher are changed to grades of "P" (Pass) and may be applied to a degree program. All grades of "D+" or lower are removed from the GPA calculation. These changes apply only to coursework completed at The University of Alabama. A notation regarding the Academic Second Opportunity will appear on the transcript.

ACADEMIC STANDING - A student's academic standing is computed based on the total number of earned hours and a student's institutional GPA. A student's current academic standing at the time of transcript printing is reflected under the last term completed. Students with an academic standing of "Good Standing" or "Academic Warning" are considered eligible to return.

ACCREDITATION - The University of Alabama is accredited by the Southern Association of Colleges and Schools Commission on Colleges to award baccalaureate, masters, educational specialist, and doctoral degrees. Contact the Commission on Colleges at 1866 Southern Lane, Decatur, Georgia 30033-4097 or call 404-679-4500 for questions about the accreditation of The University of Alabama.

CALENDAR - The University of Alabama operates under a semester system. The University's academic calendar is divided into fall, spring, and summer semesters.

CLASSIFICATIONS - The University of Alabama classifies students based on earned hours as follows:

Undergraduate

Freshman: 0 - 30.999 semester hours

Sophomore: 31 - 60.999 semester hours

Junior: 61 - 90.999 semester hours

Senior: 91 or greater semester hours

Law

First-year law student: 0 - 29.999 semester hours

Second-year law student: 30 - 53.999 semester hours

Third-year law student: 54 or greater semester hours

COURSE NUMBERING SYSTEM - The proper interpretation of course numbers of The University of Alabama is as follows:

001-099: Remedial non-credit courses

100-199: Primarily for freshmen

200-299: Primarily for sophomores

300-399: Primarily for juniors

400-499: Primarily for seniors

500-699: Primarily for graduate and law courses

700+: Professional courses for law and medical students

FORGIVENESS POLICY - Discontinued November 1, 2001, students enrolled in undergraduate programs at The University of Alabama were allowed to drop a maximum of three courses taken at the University from the computation of the GPA. Courses not computed in the GPA could not be applied toward baccalaureate degree requirements. These courses and grades remained on the transcript but were excluded from earned hours and the GPA. Once a course was dropped from GPA computation under this policy, the grade and credit could not be restored.

FULL-TIME STATUS - The University of Alabama defines full-time status as follows:

Undergraduate: 12 semester hours

Graduate: 9 semester hours

Law: 10 semester hours

Medical: 12 semester hours

GRADING SYSTEM - The University of Alabama utilized a 3 point grading system from 1831 through August 1983 (summer term). Effective fall semester 1983, The University of Alabama converted to a 4 point grading system. Beginning fall semester 1994, the University moved to a plus/minus grading system for those students who had no previous higher education work. The value of the A+ changed from 4.0 to 4.33 effective with the fall semester 1999. The maximum overall GPA a student can earn is 4.0. The following grade notations are used in computing the Grade Point Average (GPA - the quotient of quality points divided by quality hours):

Grade	Grade points per hour credit
A+	4.33
A	4.0
A-	3.67
B+	3.5 (Law students beginning prior to Summer 2003)
B	3.33
B-	3.0
C+	2.67
C	2.5 (Law students beginning prior to Summer 2003)
C-	2.33
D	2.0
D-	1.67
F	1.33
F	1.0
F	0.67
F	0.0
AU (Audit)	0.0 Not used in computation of GPA or enrollment status
DO (Dropped Out)*	0.0 Not used in computation of GPA
I (Incomplete)	0.0 Computed same as 'F'
IP (In Progress)	0.0 Not used in computation of GPA
N (No grade reported)	0.0 Computed same as 'F'
NA (Never Attended)*	0.0 Not used in computation of GPA
NC (No credit)	0.0 Not used in computation of GPA
NG (Not Graded)	0.0 Not used in computation of GPA
P (Pass)	0.0 Not used in computation of GPA
W (Withdrawn)	0.0 Not used in computation of GPA
WF (Withdrawn Failing)*	0.0 Computed same as 'F'
WP (Withdrawn Passing)*	0.0 Not used in computation of GPA

*Grade is no longer in use

PLACEHOLDER COURSES - Students participating in the National Student Exchange program, various consortium agreements, and various study abroad programs may be placed into courses designated by CIP, MSC, or NSE subject codes, respectively, for the purposes of enrollment verification and tuition payment. Following the term of enrollment, these courses will be graded "NG" (Not Graded). Actual coursework earned will be posted on the transcript in addition to the placeholder course.

RELEASE OF INFORMATION - The Family Educational Rights and Privacy Act of 1974 and later amendments prohibits release of information from this document to a third party without the student's written consent.

REPEATED COURSES - When courses are repeated, only the most recent attempt will count towards earned hours (with the exception of courses approved for repeatable credit). Grades for all attempts remain on the record and are computed in the student's GPA.

TRANSFER WORK - Transfer hours may be applied to degree programs and are computed in a student's overall GPA. All transfer courses listed on the transcript do not necessarily apply towards a degree program.

TRANSCRIPT VALIDATION - An official transcript is printed on secure paper, does not require a raised seal, and is valid only when it bears the signature of the registrar. Hold document up to the light to see the translucent watermark image. This transcript is printed on a crimson background. When photocopied in color, the word "VOID" will appear. A black and white transcript is NOT an original document.

Any questions regarding the validity of this transcript should be directed to: The University of Alabama, Office of the University Registrar, 206 Student Services Center, Box 870134, Tuscaloosa, AL 35487, (205) 348-2020, registrar@ua.edu.

June 23, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am thrilled to write this letter of recommendation for Ms. Maya Stevenson, who is an outstanding rising third year law student at The University of Alabama School of Law. I have known Ms. Stevenson since her first year of law school and it has been a pleasure to watch her soar. Ms. Stevenson has the intellect, skill, and work ethic to excel as a judicial clerk. I think she could serve your chambers with distinction. I endorse her application enthusiastically. I hope you will meet her and give her application your fullest consideration.

I have had the privilege of serving on the faculty and teaching at The University of Alabama School of Law for the past 32 years. Most of my courses relate to Constitutional Law. In the first-year curriculum, I teach a comprehensive introduction to constitutional cases. I require students to read, brief, and present leading cases, which we examine closely during class discussions. In advanced classes, we also discuss leading cases, however, students primarily write research papers. In all my classes, I have the chance to observe and evaluate carefully how each student engages the materials and each student's skills. I am proud to write that Alabama Law has many terrific and talented students.

I had the opportunity to observe Ms. Stevenson's talents especially well when she enrolled in my Equal Protection seminar this past spring. The purpose of the seminar course is to provide each student the opportunity to research and write a paper of publishable quality. After initially reading a series of landmark Equal Protection cases, participants presented drafts of their papers to the class. Each participant read each paper. With only five students in the class, I could carefully observe and evaluate each student.

Ms. Stevenson was superb in the class. She read and digested the cases and raised perceptive insights about the various opinions of the justices. For her research paper, she critiqued the Court's equal protection analysis in *McCleskey v. Kemp*, explaining why the Court's disproportionate impact assessment was inadequate and unpersuasive. Her paper examined the background of the case, its jurisprudential impact, and how the Court should have approached the analysis of the case in light of its precedent. Ms. Stevenson has the aptitude to work through complex materials and to present them clearly.

She also has excellent research and writing skills which will enable her to do the work of a judicial law clerk. She conducted excellent research for her paper, examining the academic literature, leading Supreme Court cases, and state court decisions that related to her topic.

I also had the pleasure of having Ms. Stevenson in my Due Process Survey class last Fall, in which I also witnessed her superior attention to detail. In the Due Process course, Ms. Stevenson was assigned *Obergefell v. Hodges*, on which she prepared a multi-page brief for the class, breaking down each issue, what each Justice wrote in the opinion, and the Due Process issues examined in the case. I was extraordinarily impressed with her ability to simplify such a lengthy and complex decision.

Ms. Stevenson also has a reputation for hard work. Throughout her time in law school, both in and outside the classroom, she has been known as a person with an exceptional work ethic. Ms. Stevenson is involved in multiple law school activities and is one of the most active members of our community. She was recently selected as Editor in Chief for the Alabama Civil Rights and Civil Liberties Law Review. Everyone in the law school has the utmost confidence in Ms. Stevenson's ability to lead the journal. It is evident that she has a clear appreciation for the subject matter of the journal and will take her duties seriously.

Beyond her participation on her journal, Ms. Stevenson has also been an active member of the law school's nationally ranked moot-court program. During her second year, she was handpicked out of many applicants to be on the Civil Rights and Liberties Moot Court team, an opportunity rarely afforded to second-year law students. Her team performed well in the competition, bringing back another moot court award for the Law School. Furthermore, the semester after she competed in the Civil Rights and Liberties Moot Court competition, she competed in the law school's internal competition, where she once again beat out many participants to make the prestigious John A. Campbell Moot Court Board.

Finally, Ms. Stevenson meets people easily and works well on a team. Our law school has a very collegial and supportive environment, and Ms. Stevenson has a reputation for being supportive and collaborative with her classmates. I have no doubt that if you meet her, you will be impressed. Again, I endorse her application for a judicial clerkship with great enthusiasm.

Sincerely,

Bryan K. Fair
Thomas E. Skinner
Professor of Law

Bryan Fair - bhastings@law.ua.edu

June 19, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to enthusiastically support Maya Stevenson's application for a clerkship in the federal courts. I believe her demonstrated commitment to equal justice for all citizens, serving the indigent, and adherence to the rule of law makes her an ideal candidate to assist federal judges in their duties.

The Capital Appeals Project is a 501(c)(3) non-profit public defense organization that provides representation to indigent defendants sentenced to death in their direct appeals and post-conviction cases, provides pre-indictment representation for defendants facing capital charges, provides consultation, research, and support to trial teams during the course of capital trials, and represents clients in other related litigation. CAP attorneys also represent clients in federal habeas proceedings and accept CJA appointments in non-capital cases.

Maya interned for me during the summer of 2022. During that summer, she was my right-hand woman as Executive Director of the organization. She performed a wide variety of tasks, from scanning and indexing documents, to interviewing jurors from a capital trial. She drafted post-conviction claims for our clients' state petitions, assisted with the Unanimous Jury Project to preserve claims following *Edwards v. Louisiana*, and, most significantly, observed an entire capital sentencing trial while sending daily detailed notes to the team.

Her federal work included reviewing a record in a direct appeal before the Fifth Circuit Court of Appeals, researching and writing a first draft of the client's brief, drafting a memorandum regarding the recent SCOTUS decision in *Wooden v. United States*, reviewing pre-sentence investigations, and calculating guideline ranges.

Maya has an outstanding work ethic, routinely working long hours and putting in strong effort, and notably drafted an emergency memorandum over a holiday weekend before she even began her summer internship. She works well with others, and developed good rapport with our incarcerated clients. But I think most notably, she has a maturity that I don't often see in our law student interns. She understood the high stakes of what we do, and never complained or made it about her. Her qualities are what I would look for in a staff attorney, and I believe she is very well-suited for the role of a federal clerkship.

Sincerely,

Cecelia Kappel

Executive Director, Capital Appeals Project

Cecelia Kappel - CTKappel@defendla.org

June 20, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am thrilled to write this letter of recommendation for Ms. Maya Stevenson, who is an outstanding rising third year law student at The University of Alabama School of Law. I have known Ms. Stevenson since her first year of law school and it has been a pleasure to watch her soar. Ms. Stevenson has the intellect, skill, and work ethic to excel as a judicial clerk. I think she could serve your chambers with distinction. I endorse her application enthusiastically. I hope you will meet her and give her application your fullest consideration.

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Sincerely,

Bryan K. Fair
Thomas E. Skinner
Professor of Law

Bryan Fair - bfair@law.ua.edu - 2053487494

WRITING SAMPLE

Maya Stevenson

201 Marina Drive, Apt. 507

Tuscaloosa, AL 35406

(225) 454-9795

The attached writing sample is an excerpt from a brief submitted to my school's internal Moot Court Competition this Spring. The competition determines who is selected for the law school's Moot Court Board based on brief and oral advocacy scores. Following my selection for the moot court board, I was selected for the law school's Tax Moot Court team, the reigning champions of the Florida Bar Tax Moot Court Competition. The competition's problem involved an interpretational question of whether Rule 4(c) of the Federal Rules of Appellate Procedure precludes relief from incarcerated individuals with representation, with the Supreme Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988) operating as the main case for the problem. The case was on appeal to the United States Supreme Court, with both lower courts ruling in the respondent's favor. This sample contains my argument section. This piece is completely self-written and self-edited.

My team was assigned the respondent, Wesley L. Petrosian, the incarcerated individual in the case. I wrote the first issue, which considered the following question:

- I. Under Federal Rule of Appellate Procedure 4(c), is an incarcerated individual with passive representation precluded from the broad terms of its protection?

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT’S RULING BECAUSE FEDERAL RULE OF APPELLATE PROCEDURE 4(C) IS NOT LIMITED TO PRO SE INDIVIDUALS.

Rule 4(c) of the Federal Rules of Appellate Procedure provides the appellate procedure that must be followed for an inmate confined in an institution to timely file an appeal. Fed. R. App. P. 4. Rule 4(c) affords such inmates the benefit of the “mailbox rule”—under this rule, a notice of appeal is considered filed on the date that it is deposited in the prison mail system. It imposes only two requirements on incarcerated individuals to receive this benefit: (1) The appeal must be deposited in the institution’s “internal mail system” on or before the last day of filing, and (2) The appeal must be accompanied with the appropriate certification of timing. *Id.*

Notably absent is a requirement that the inmate not be represented by counsel. Rule 4(c) is not sufficiently ambiguous or absurd to warrant courts reading in such a requirement. Unlike other Federal Rules of Appellate Procedure where the drafters have clearly distinguished between pro-se individuals and individuals with representation, no such distinction is present in Rule 4(c).

This Court has never held that the benefit of the prison-mailbox rule applies only to pro se individuals. While the seminal case regarding the mailbox rule *Houston v. Lack*, 487 U.S. 266 (1988), revolves around an incarcerated individual proceeding pro se, it would be incorrect to read its holding as only applying to pro se individuals. Instead, the analysis in *Houston* focuses on three characteristics that make an incarcerated individual uniquely situated, and thus, in need of the mailbox rule’s protection. These characteristics center on the lack of control afforded to incarcerated individuals as compared to non-incarcerated individuals which are them being: “(1)

Unskilled in law; (2) Unaided by counsel; and (3) Unable to leave the prison.” *Id.* at 271. These characteristics not only describe incarcerated individuals proceeding pro se but can describe incarcerated individuals generally. While Rule 4(c) cannot be read to encompass those with dedicated representation managing each part of their appeal, its protection should be afforded to those who possess the three characteristics written by this Court.

Houston also does not expressly limit the benefit of the mailbox rule to only pro se incarcerated individuals. Such a narrow interpretation of *Houston* misconstrues this Court’s analysis. This Court in *Houston* held that pro se incarcerated individuals are entitled to the mailbox rule because of the characteristics they possess, not because they are pro se. A “form over substance” interpretation fails to include prisoners that are disadvantaged in the same way as pro se ones.

A broader, characteristic-based interpretation is further supported by the plain text of Rule 4(c). The drafters of the Federal Rules of Appellate Procedure wrote Rule 4(c) to codify the legal analysis of *Houston*. This codification accurately reflects both the intentions of this Court and the drafters of the rule, which makes no distinction between incarcerated individuals with representation and those without.

The Thirteenth Circuit correctly applied this characteristic-based interpretation, in agreement with the Fourth and Seventh Circuits. *See United States v. Moore*, 24 F.3d 624 (4th Cir. 1994) (noting that whenever an individual files a notice of appeal from prison, they are acting “without the aid of counsel”); *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004) (holding that the mailbox rule applies to “an inmate confined in an institution,” and courts should not unnecessarily pencil in extra wording). Other Circuits have disagreed with this interpretation, instead more narrowly interpreting Rule 4(c) to only apply to pro se individuals. *See Burgs v.*

Johnson Cnty., Iowa, 79 F.3d 701 (8th Cir. 1996) (holding that an incarcerated individual with representation was not in the same position as those entitled to the benefit of *Houston*); *Cousin v. Lensing*, 310 F.3d 843 (5th Cir. 2002) (holding that the justifications for the leniency with pro se prisoner litigants were not applicable to prisoners represented by counsel); *Cretacci v. Call*, 988 F.3d 860 (6th Cir. 2021) (holding that in the context of civil complaints, the prison mailbox rule only applies to unrepresented prisoners who are proceeding pro se); *Stillman v. LaMarque*, 319 F.3d 1199 (9th Cir. 2003) (holding that because an attorney prepared an inmate's habeas petition, the inmate was not proceeding pro se); *United States v. Rodriguez-Aguirre*, 30 F. App'x 803 (10th Cir. 2002) (holding that because there was no evidence of untimeliness being due to exceptional circumstances or circumstances beyond the inmate's control, there was no need for the mailbox rule); *United States v. Camilo*, 686 F. App'x 645 (11th Cir. 2017) (holding that because the mailbox rule was not intended to help prisoners with counsel, it could not apply).

This Court should adopt the broader interpretation utilized by the Thirteenth, Fourth, and Seventh Circuits. First, Rule 4(c) does not include any express limitation of it only applying to pro se individuals, nor is it sufficiently ambiguous or absurd to necessitate courts reading extra words into it. Second, a broader interpretation of the rule is consistent with this Court's analysis in *Houston*. *Houston*, though concerning the circumstances of a pro se individual, should not be read to impose a pro se requirement on Rule 4(c). Instead, its analysis should be confined to the three characteristics this Court defined that merit the protection of the mailbox rule. An in-depth reading of *Houston* reveals this Court's focus is not only on procedure, but fairness. A narrower interpretation foregoes this factor. Lastly, even a narrower interpretation yields the result of *Petrosian* being afforded the protection of the mailbox rule.

A. The text of Rule 4(c) is sufficiently broad to encompass all incarcerated individuals, not only those proceeding pro se.

Rule 4(c) of the Federal Rules of Appellate Procedure defines the procedure for an “appeal by an inmate confined in an institution.” Fed. R. App. P. 4(c). Rule 4(c) prescribes the conditions under which an appeal filed by an inmate is considered timely: (1) When it is deposited in the institution’s internal mail system “on or before the last day for filing,” and (2) When it is accompanied with the appropriate certification of timing. Fed. R. App. P. 4(c)(1). No further requirements are imposed. When this Court interprets federal rules such as the Federal Rules of Civil Procedure, this Court accords the rule its plain meaning. If this Court finds the terms of the rule unambiguous, judicial inquiry into the meaning of the rule is complete. *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989). Only in circumstances where the rule is incoherent or absurd should a court bypass the plain meaning of the rule, conducting further judicial inquiry into the meaning of the rule. *Id.*

The plain meaning of Rule 4(c) requires that Petrosian is entitled to the benefit of the mailbox rule, regardless of his representation status. As mentioned, Rule 4(c) only imposes two requirements for an inmate’s appeal to be considered timely—it must be deposited on or before the last day for filing and it must have the appropriate certification. As the Thirteenth Circuit noted, Petrosian met both requirements. R at 11. Neither party disputes this. This is where the analysis should end.

The plain meaning of 4(c) as accorded by this Court’s method of interpretation proves the result that Petrosian is entitled to the protection of the “mailbox rule,” regardless of his representation status. As the Seventh Circuit noted in *United States v. Craig*, the mailbox rule is dependent on Rule 4(c), which applies to “an inmate confined in an institution.” *Craig*, 368 F.3d

738 at 740. As the defendant in *Craig* did, Petrosian meets that description. Accordingly, this Court should not adopt an interpretation that unnecessarily adds extra requirements to Rule 4(c).

Further noted by the Seventh Circuit, Rule 4(c) is “neither incoherent nor absurd.” *Id.* The text of Rule 4(c) does not provide limitations in the text that indicate that the rule should only apply to unrepresented individuals, nor does it provide inconsistent wording that would yield such a result. Furthermore, as defined by this Court, the standard for absurdity to overcome the plain meaning of the text is extraordinarily high. Indeed, it must be “so monstrous, that all mankind would, without hesitation, unite in rejecting the application.” *Sturges v. Crowninshield*, 17 U.S. 122, 203 (1819). It is unlikely that a broader interpretation affording incarcerated individuals the fairness principles advanced by this Court in *Houston* would result in all mankind uniting in rejecting the text of Rule 4(c) applied to incarcerated individuals generally. No incoherency or absurdity is present that warrant broadening Rule 4(c) beyond its text. Therefore, this Court should follow its precedent and follow the plain meaning of Rule 4(c), which does not distinguish between pro se prisoners and those with representation.

Other Federal Rules of Appellate Procedure further demonstrate the importance of according Rule 4(c) its plain meaning, as the drafters continuously signify when they are drawing a distinction between unrepresented and represented parties. *See, e.g.*, Fed. R. App. P. 25(a)(2)(B)(describing electronic filing processes for unrepresented and represented persons); Fed. R. App. P. 30(a)(3)(distinguishing the number of copies of the appendix that must be provided by unrepresented and represented persons); Fed. R. App. P. 31(b)(distinguishing the number of briefs that must be provided by unrepresented and represented persons); Fed. R. App. P. 32(a)(2)(describing the color of the cover of briefs for represented and unrepresented parties); Fed. R. App. P. 32(g)(1)(describing who must provide a certificate for a brief).

The drafters of the Federal Rules of Appellate Procedure clearly know how to distinguish between unrepresented and represented parties. Yet Rule 4(c)'s only category is an "inmate confined to an institution." Fed. R. App. P. 4(c)(1). Rule 4(c) makes no distinction between represented and unrepresented, further demonstrating that it was designed to apply to all inmates confined to an institution, not only those proceeding pro se.

The legislative history of Rule 4(c) further emphasizes the need to rely on Rule 4(c)'s plain meaning. First, Rule 4(c) codified the *Houston* decision, which similarly makes no express distinction between represented and unrepresented individuals. It was designed with this understanding in mind. *See* Fed. R. App. P. 4 Advisory Committee's Note to 1993 Amendment. Second, the Advisory Committee considered a version of the rule limited to "persons not represented by an attorney," but instead decided to forgo such a narrow requirement. Advisory Committee on Rules of Appellate Procedure, *Minutes of the April 17, 1991 Meeting of the Advisory Committee on Federal Rules of Appellate Procedure*, <https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-appellate-procedure-april-1991>

Because such a distinction was not included by the Advisory Committee—despite being considered—the Advisory Committee intended for the rule to apply more broadly. Finally, Rule 4(c) has been amended several times since its incorporation, and none of the amendments add the requirement that incarcerated individuals must proceed pro se to obtain its benefit. *See, e.g.*, Fed. R. App. P. 4 Advisory Committee's Note to 1993 Amendment; Fed. R. App. P. 4 Advisory Committee's Note to 1998 Amendment; Fed. R. App. P. 4 Advisory Committee's Note to 1979 Amendment.

Considering the ongoing circuit split, if the Advisory Committee deemed it necessary to distinguish between pro se incarcerated individuals and those with representation, such an

amendment could have been brought. Since it has not, this further indicates that Rule 4(c) is designed to apply equally to incarcerated individuals.

The plain text of 4(c) demonstrates that the rule is not designed to only encompass incarcerated individuals proceeding pro se. This is further demonstrated throughout the other Federal Rules of Appellate Procedure which continuously make a clear distinction between represented parties and unrepresented parties. Rule 4(c) contains no such distinction. Similarly, the legislative history of 4(c) indicates that the drafters of 4(c) intentionally did not preclude its protection from individuals with representation. Therefore, Petrosian meets the qualifications of the rule, as he is an inmate, and accordingly, should be afforded the protection of the mailbox rule.

B. *Houston* should not be read to only apply to pro se individuals.

In *Houston v. Lack*, this Court considered whether a pro se prisoner's notice of appeal is filed at the moment of delivery to prison authorities or when the court receives the notice of appeal. *Houston*, 487 U.S. 266 at 269-270. Under Rule 4(a)(1), this Court held that the notice of appeal was filed at the moment of delivery because of three factors specific to prisoners who file their own appeals. Though the focus of *Houston*'s analysis was a pro se individual, this Court noted that prisoners filing appeals face a unique set of challenges that other appellants do not. *Id.* at 270.

As noted by the Seventh Circuit in *Moore*, a narrow interpretation of *Houston* ignores the reality that even incarcerated individuals with counsel may face circumstances that force them to need the protection of the mailbox rule. *Moore*, 24 F.3d 624 at 626. Because of this, this Court should rely on a broader interpretation that more effectively embodies this Court's approach in

Houston, which is an approach focusing on the unique factors that warrant the protection of the mailbox rule.

The three characteristics described by this Court in *Houston* that make an incarcerated individual's situation unique are the prisoner being: (1) Unskilled in law; (2) Unaided by counsel; and (3) Unable to leave the prison. *Houston*, 487 U.S. 266 at 271–72. All three of these characteristics can apply to incarcerated individuals with representation. Petrosian's circumstances are an example of such a situation. Petrosian has no formal training in law—he only possessed instructions from Krush on how to file a notice of appeal on his own and an explanation of its urgency. Petrosian also filed his notice of appeal completely unaided by counsel. Krush did not help prepare the materials. Petrosian prepared and deposited his valid notice of appeal. R. at 8. Finally, because Petrosian was confined to the Riga Correctional Institution, he was unable to leave the prison. *Id.*

As this Court noted in *Houston*, the prisoner's control over the processing of their notice “necessarily ceases as soon as he hands it over to the only public officials to whom he has access, the prison authorities, and the only information he will likely have is the date he delivered the notice to those authorities and the date ultimately stamped upon it.” *Houston*, 487 U.S. 266 at 271. Petrosian's control ceased as soon as he handed it over to the prison authorities that day, demonstrating the same need for the mailbox rule as the pro se litigant in *Houston*.

Furthermore, *Houston* places no express limitation on whom the mailbox rule can apply to. While the opinion does mention pro se litigants several times, never does this Court make an explicit distinction between represented and unrepresented parties. Instead, this Court focuses on characteristics indicative of how much control an inmate retains over the filing of their notice of

appeal. Like the litigant in *Houston*, Petrosian retained no control over the filing of his notice of appeal and was in as much need of the mailbox rule as a pro se litigant.

While a less limited interpretation may open the “floodgates of litigation” or cause impairment to judicial efficiency, such concerns ignore not only the fairness principles underlying *Houston*, but the entire purpose of the judiciary. At the core of the judiciary is the pursuit of justice which requires litigants having the right to “adjudication of their rights in the tribunals which Congress has empowered to act.” *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 425 (1964). Appeals are also a defining feature of an independent and impartial judiciary, allowing litigants the appropriate remedy when a lower court has reached the wrong conclusion. *See* United States Courts, *U.S. Courts of Appeals and Their Impact on Your Life*, <https://www.uscourts.gov/educational-resources/educational-activities/us-courts-appeals-and-their-impact-your-life>.

The case before the Court demonstrates this, as without the protection of the mailbox rule, Petrosian would have been unable to challenge his imprisonment. Any argument otherwise asks this Court to consider the number of cases rather than the legal merits the judiciary is designed to address and offends this country’s sense of justice.

Houston is premised on the idea of fairness, understanding that incarcerated individuals do not have the same access to filing a notice of appeal as those who are not confined to an institution they cannot leave. *See Houston*, 487 U.S. 266 at 270–72. To leave an entire category of people within these institutions unprotected abrogates the fairness principles advanced by this Court in *Houston*. Further, those with dedicated representation would have no need for Rule 4(c), and would have no need to invoke its protection, preventing an unfair advantage.

Therefore, *Houston* cannot be read to only include pro se individuals, and accordingly, Petrosian should be afforded the protection of the mailbox rule.

1. Even a narrow reading of *Houston* results in the mailbox rule applying to Petrosian.

Even under a more narrow interpretation of *Houston*, Petrosian should still be afforded the protection of the mailbox rule. If this Court does find that *Houston* is limited to pro se individuals, Petrosian was effectively acting pro se at the time of his appeal. Petrosian completed the same actions as a pro se litigant, undermining the idea that he was represented outside of a passive sense at the time of his appeal. This is because in *Houston*, this Court did not focus on the label of being pro se, but rather the characteristics of the pro se litigant. This Court considered several distinguishing factors regarding pro se prisoners appealing, including: (1) such prisoners being unable to “take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30-day deadline;” (2) pro se prisoners being unable to travel to the courthouse to ensure the timeliness of the appeal; (3) while other litigants can entrust the notice of appeal to other parties, only the pro se prisoner is forced to do so; and (4) the pro se prisoner having no choice but to entrust the forwarding of his notice to prison authorities who he retains no control over. *Houston*, 487 U.S. 266 at 271.

At the time of filing his appeal, Petrosian fell into all these categories. Petrosian was unable to take the steps other litigants can take to monitor the process of his notice of appeal and ensure that the court clerk received and stamped his notice of appeal before the deadline. Petrosian was confined to his institution, meaning he could not travel to the courthouse to ensure the timeliness of the appeal. Other litigants who are actively represented can entrust the appeal to other parties, but Petrosian was forced to handle his own appeal. Krush was out of town and had

no method of preparing or mailing the appeal before the deadline. R. at 8. While Judge Carlsen notes in his dissent that Krush could have utilized other methods to expedite the delivery of Petrosian's notice of appeal, such analysis hinges on a hypothetical statement of facts which this Court should not consider. *Id.* at 23. Considering these hypothetical facts in an opinion would result in this Court issuing an advisory opinion, which this Court has said is impermissible. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013). At the time of filing his notice of appeal, Petrosian was forced to entrust his appeal to prison authorities, who he retained no control over. He had no ability to otherwise entrust it to others.

Even under the Circuits which narrowly interpret Rule 4(c), Petrosian would likely still be afforded its protection. In *Stillman v. LaMarque*, prisoner Fred Stillman was actively represented at the time of his appeal, and therefore did not qualify for the protection of the mailbox rule. *Stillman*, 319 F.3d 1199 at 1201. The Ninth Circuit relied on a California Supreme Court ruling defining the practice of law: "When a lawyer prepares legal documents on behalf of a prisoner and arranges for those documents to be signed and filed, the prisoner is not proceeding without assistance of counsel." *Id.* Stillman's attorney not only prepared his petition for a writ of habeas corpus but filed it. Because his attorney prepared legal documents for him, and arranged for them to be filed and signed, Stillman could not be proceeding pro se. *Id.* Accordingly, because Stillman had active representation participating in each part of his legal proceedings, the Ninth Circuit held that he could not qualify for the protection of the mailbox rule. *Id.* at 1200.

This is wholly dissimilar to the case before this Court. Here, Krush only explained to Petrosian how to file an appeal and stressed the urgency of filing the appeal. Petrosian not only prepared the appeal but sent it off himself. R. at 8. The steps that were taken by the attorney in

Stillman were taken by Petrosian in this case, demonstrating that he was acting without representation even under a narrower interpretation of *Houston*.

In *Cretacci v. Call*, the Sixth Circuit reasoned that a prisoner should not be afforded the protection of the mailbox rule if the prisoner does not need to use the prison mail system and can rely on counsel to file a pleading on their behalf. *Cretacci*, 988 F.3d 860 at 867. The court in *Cretacci* explicitly relied on the fact that the attorney developed the prisoner's case and wrote the complaint. Like the Ninth Circuit in *Stillman*, the Sixth Circuit also relied on Tennessee's definition of representation, writing that when an attorney agrees to represent a client and writes legal documents on the client's behalf, the client is not proceeding without representation. *Id.* at 866. Cretacci and his attorney had an "explicit attorney-client relationship," in which his attorney developed Cretacci's case against the prison, crafted a legal strategy for the case, and wrote the complaint. *Id.* In reliance on Tennessee's definition of representation and the Ninth Circuit's decision in *Stillman*, the Sixth Circuit found that Cretacci was actively represented by counsel when he filed his appeal, despite him mailing it from the prison.

Here, Krush merely agreed to represent Petrosian, and Petrosian prepared his own legal documents. Krush informed Petrosian of the immediacy of filing the appeal and how to file it, but that was the extent of her representation. R. at 8. Accordingly, Petrosian and Krush wouldn't meet the Sixth Circuit's standard for representation indicating the likely result that the court would have ruled in Petrosian's favor in the present case, despite the narrow interpretation the court relies on.

As the Thirteenth Circuit noted, Petrosian was only represented in a passive sense, and was still at the mercy of the prison's mail system and the postal service. R. at 15. Krush merely advised Petrosian on how to file a notice of appeal and told him to file it immediately. It is

unlikely that Krush's representation meets any state's definition of representation as the attorneys did in *Stillman* and *Cretacci*. No one assisted Petrosian with the filing of his appeal, as the attorney did in *Stillman*. Petrosian retained no agent through which he could control the conduct of his action. Instead, Petrosian was forced to rely on prison authorities, as Krush could not file his appeal. Because Petrosian still meets the requirements for the protection of the mailbox rule under a narrower interpretation of *Houston*, he should be afforded its protection if this Court relies on the more narrow interpretation advanced by the government.

Applicant Details

First Name	Donny											
Middle Initial	E											
Last Name	Stewart											
Citizenship Status	U. S. Citizen											
Email Address	stewde21@wfu.edu											
Address	<table><tbody><tr><td>Address</td></tr><tr><td>Street</td></tr><tr><td>3045 NC Hwy 55 W</td></tr><tr><td>City</td></tr><tr><td>New Bern</td></tr><tr><td>State/Territory</td></tr><tr><td>North Carolina</td></tr><tr><td>Zip</td></tr><tr><td>28562</td></tr><tr><td>Country</td></tr><tr><td>United States</td></tr></tbody></table>	Address	Street	3045 NC Hwy 55 W	City	New Bern	State/Territory	North Carolina	Zip	28562	Country	United States
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City												
New Bern												
State/Territory												
North Carolina												
Zip												
28562												
Country												
United States												
Contact Phone Number	252-474-6904											

Applicant Education

BA/BS From	Campbell University
Date of BA/BS	May 2021
JD/LLB From	Wake Forest University School of Law
	http://www.law.wfu.edu
Date of JD/LLB	May 20, 2024
Class Rank	50%
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	Yes
Moot Court Name(s)	Wake Forest Law's Stanley Moot Court Competition
	Wake Forest Law's Walker Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **Yes**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

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Gibson, Brenda
gibsonb@wfu.edu

Hong, Esther
esther.hong@asu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Donny Stewart Jr.

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June 12, 2023

Hon. Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

As a third-year student at Wake Forest University School of Law with a strong commitment to justice and advocacy, I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I am particularly interested in learning from you due to your background in criminal law, an area of law in which I plan to practice in the future. Additionally, as a person of color that is part of the LGBTQ+ community, it would be meaningful to work with and learn from someone who understands that perspective. Clerking in your chambers at the U.S. District Court for the Eastern District of Virginia would be an honor and is my first choice for employment after graduation from law school.

The breadth of my undergraduate and law school activity both in and out of the classroom reflects my commitment to tackling systemic social justice issues. The murder of Trayvon Martin was a pivotal moment that directed my path toward law school, and I have since worked to bring awareness to the unique issues faced by marginalized groups. Post graduation, I intend to use my law degree to help alleviate those issues to the best of my ability. I have already begun this work through my involvement in the Juvenile Sentence Review Board *pro bono* project, in which I drafted a clemency petition for an incarcerated person, and in my previous summer internship at the Forsyth County Public Defender's Office, where I worked to provide indigent defendants with the best legal representation possible.

I am confident that I could contribute meaningfully to the U.S. District Court for the Eastern District of Virginia in Norfolk, VA. As an intern with Judge Loretta Biggs in the U.S. District Court for the Middle District of North Carolina this summer, I am conducting extensive research and drafting orders which provide rulings on motions for compassionate release. As a teaching assistant for the Legal Analysis, Writing, and Research course this past year, I have developed strong writing and research skills and have facilitated growth in these areas for first-year law students as well. I will further strengthen these skills in the Appellate Advocacy Clinic this year where I will brief and argue cases in federal courts of appeals. I have also completed relevant coursework in trial advocacy and will complete a course on federal courts this fall.

I would welcome the opportunity to interview with you. I have included my resume, writing sample, undergraduate transcript, and law school transcript. Professors Esther Hong, Brenda Gibson, and Eileen Prescott have submitted separate letters of recommendation on my behalf. If I can provide any additional information, please let me know. Thank you for your time and consideration.

Respectfully,



Donny Stewart

Donny Stewart Jr.New Bern, North Carolina • (252) 474-6904 • stewde21@wfu.edu • www.linkedin.com/in/donny-stewart-jr**EDUCATION**

Wake Forest University School of Law , Winston-Salem, North Carolina	May 2024
<i>Juris Doctor Candidate</i>	
GPA:	3.446/4.000
Honors:	Fletcher Scholar
Employment:	Teaching Assistant, <i>Appellate Advocacy</i> , Professor Brenda Gibson Lexis Student Representative, <i>LexisNexis</i> Teaching Assistant, <i>Legal Analysis, Research, and Writing</i> , Professor Brenda Gibson Research Assistant, <i>Professor Esther Hong</i>
Involvement:	Vice President, <i>Black Law Students Association</i> Member, <i>Phi Alpha Delta</i> Member, <i>Chief Justice Joseph Branch Inn of Court</i> Event Coordinator, <i>Society for Criminal Justice Reform</i> Participant, <i>Stanley Moot Court Competition</i> , <i>Walker Moot Court Competition</i> , <i>Transactional Law Competition</i>
<i>Pro Bono</i> :	Juvenile Sentence Review Board Name Change Clinic
Campbell University , Buies Creek, North Carolina	May 2021
<i>Bachelor of Arts, Criminal Justice Pre-Law, summa cum laude and Bachelor of Science, Psychology, summa cum laude</i>	
GPA:	3.94/4.00 (Top 5%)
Honors:	Sara Virginia Hackney Award of Excellence Outstanding Senior in Psychology Award
Employment:	Peer Mentor Student Life Office Intern Resident Assistant
Honor Societies:	Sigma Tau Delta, Pi Sigma Alpha, Pi Gamma Mu, Alpha Phi Sigma, Psi Chi
Involvement:	Member, <i>Antiracism Student Committee</i> Co-founder & President, <i>Social Justice Club</i> President, <i>Criminal Justice Association</i> Member & Team Leader, <i>Orientation Leader</i> Member, <i>Step-Up Program</i> Member, <i>Mock Trial</i>

EXPERIENCE

Judicial Chambers of The Honorable Loretta C. Biggs , Winston-Salem, North Carolina	
<i>Judicial Intern</i>	Apr. 2023 – Present
<ul style="list-style-type: none"> Research applicable law regarding Motions for Compassionate Release Review and summarize motions and draft orders ruling on those motions Observe legal proceedings in various stages of the adversarial process 	
Forsyth County Public Defender's Office , Winston-Salem, North Carolina	
<i>Legal Intern</i>	May 2022 – July 2022
<ul style="list-style-type: none"> Transcribed and summarized complex law enforcement body camera footage into usable court transcripts Performed legal research and drafted memoranda to determine the strength of potential arguments and defenses Observed legal proceedings in various stages of the adversarial process 	
Craven County District Attorney's Office , New Bern, North Carolina	
<i>Intern</i>	May 2019 – Aug. 2019
<ul style="list-style-type: none"> Observed legal proceedings in various stages of the adversarial process Communicated information between legal staff and court officials Constructed and organized dozens of case files and prepared them for use in court 	
Texas Steakhouse and Saloon , New Bern, North Carolina	
<i>Host/Server</i>	Oct. 2015 – Mar. 2020
<ul style="list-style-type: none"> Monitored the status of the entire restaurant, tracked seating capacity, and maintained order in the dining room Greeted and seated hundreds of diverse guests while ensuring their experience was enjoyable Accurately noted and communicated food orders and delivered meals in a timely fashion; used time management and customer service skills to provide excellent service to guests of the restaurant 	

OFFICIAL TRANSCRIPT



WAKE FOREST
UNIVERSITY

Office of the University Registrar
P.O. Box 7207
Winston Salem NC 27109-7207

Student Name: **Donny Earl Stewart, Jr.**

ID: 08531732

Birthdate: 12/11

Entry Date: Aug 16, 2021

Majors: Law

Certificates and
Foreign Area Studies

Minors:

School of Law

Date Printed: 04-JUN-2023

Page: 1

Issued To:

Donny Stewart
Parchment: TWBHFUYP

Course Level: Law

SUBJ NO.	COURSE TITLE	CRED	GRD	PIS	R
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INSTITUTION CREDIT:

Fall 2021

LAW 101	Contracts I	3.00	A-	11.010	
LAW 103	Criminal Law	3.00	B+	9.990	
LAW 104	Civil Procedure I	3.00	B+	9.990	
LAW 108	Torts	4.00	A-	14.680	
LAW 110	Legl Analysis, Writing & Res I	2.00	A-	7.340	
LAW 112	LAWR I (Research)	0.50	A-	1.835	
LAW 122	Professional Development	0.00	S	0.000	

Ehrs: 15.50 GPA-Hrs: 15.50 QPts: 54.845 GPA: 3.538

Spring 2022

LAW 102	Contracts II	3.00	B+	9.990	
LAW 105	Civil Procedure II	3.00	B+	9.990	
LAW 111	Property	4.00	B+	13.320	
LAW 113	LAWR II (Research)	0.50	B+	1.665	
LAW 119	Legl Analysis, Writing & Res II	2.00	A-	7.340	
LAW 120	Constitutional Law I	3.00	B+	9.990	
LAW 122	Professional Development	1.00	A	0.000	

Ehrs: 16.50 GPA-Hrs: 15.50 QPts: 52.295 GPA: 3.373

Fall 2022

LAW 200	Legislation and Admin Law	3.00	B+	9.990	
LAW 207	Evidence	4.00	A-	14.680	
LAW 209	Constitutional Law II	3.00	B+	9.990	
LAW 219	Appellate Advocacy LAW III	2.00	A	8.000	
LAW 405	Crim Pro: Investigation	4.00	B+	13.320	

Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 55.980 GPA: 3.498

Spring 2023

LAW 500	Crim Pro: Selected Topics	2.00	A-	7.340	
LAW 508	Family Law	3.00	B	9.000	
LAW 530	Natural Resources Law	2.00	B+	6.660	
LAW 564	Immigration Law	3.00	H	0.000	
LAW 579	Policing & Legal Institutions	3.00	H	0.000	
LAW 610	Trial Practice Lecture	0.00	S	0.000	
LAW 610L	Trial Practice Lab	3.00	P	0.000	

Ehrs: 16.00 GPA-Hrs: 7.00 QPts: 23.000 GPA: 3.285

***** CONTINUED ON NEXT COLUMN *****

***** TRANSCRIPT TOTALS *****

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL	64.00	54.00	186.120	3.446
INSTITUTION				

TOTAL	0.00	0.00	0.000	0.000
TRANSFER				

OVERALL	64.00	54.00	186.120	3.446
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***** END OF TRANSCRIPT *****

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REJECT DOCUMENT IF SIGNATURE BELOW IS ALTERED

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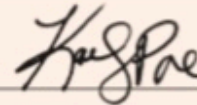
Ken J. Gilson, EdD

University Registrar and Assistant Provost for Academic Administration

OFFICE OF THE REGISTRAR
CAMPBELL UNIVERSITY
P.O. BOX 367
BUIES CREEK, NC 27506

STUDENT ACADEMIC TRANSCRIPT

REGISTRAR'S
SIGNATURE



Stewart, Donny Earl Jr. DOB: 11 Dec XXXX Student ID: 1090490 Print Date: 19 May 2021
TRANSFER CREDITS Hours Attempted 0.0 Hours Passed 59.0

TR/CR TRANSFER CREDIT
Transfer Credit---Craven Early College High School
SPAN 102 ELEMENTARY SPANISH II HS 0.0 0.0 0.0
TRANSFER... ATT: 0.0 CPT: 0.0 PTS: 0.0

TR/CR TRANSFER CREDIT
Transfer Credit---Craven Cnty College
CUPS 100 CAMPBELL UNIVER. FR. SE TR 0.0 1.0 0.0
ENGL 101 ACADEMIC WRITING TR 0.0 3.0 0.0
PSYC 222 GENERAL PSYCHOLOGY TR 0.0 3.0 0.0
ENGL 102 ACADEMIC WRITING & LITE TR 0.0 3.0 0.0
ART 131 INTRODUCTION TO ART TR 0.0 3.0 0.0
ENGL 204 AMERICAN LIT. II TR 0.0 3.0 0.0
MATH 111 COLLEGE ALGEBRA TR 0.0 4.0 0.0
SOCI 225 PRINCIPLES OF SOCIOLOGY TR 0.0 3.0 0.0
COMM 240 INTERPERSONAL COMMUNICA TR 0.0 3.0 0.0
EXER 185 LIFETIME WELLNESS TR 0.0 2.0 0.0
EXER 111 ELECTIVE ACTIVITY COURSE TR 0.0 1.0 0.0
HIST 222 UNITED STATES HISTORY I TR 0.0 3.0 0.0
MATH 112 TRIGONOMETRY TR 0.0 4.0 0.0
ENVS 1000 ENVIRONMENTAL SCI GEN C TR 0.0 4.0 0.0
PHIL 202 PHILOSOPHY ELECTIVE TR 0.0 3.0 0.0
BIOL 101 BIOLOGY FOR LIFE TR 0.0 4.0 0.0
THEA 115 PUBLIC SPEAKING TR 0.0 3.0 0.0
ENGL 205 WORLD LITERATURE I TR 0.0 3.0 0.0
HIST 221 U.S. HISTORY I TR 0.0 3.0 0.0
PSYC 232 SOCIAL PSYCHOLOGY TR 0.0 3.0 0.0
EXER 185 LIFETIME WELLNESS *TR 0.0 0.0 0.0
TRANSFER... ATT: 0.0 CPT: 59.0 PTS: 0.0

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CUC 200 MC01 CONNECTIONS A 0.5 0.5 2.0
CHRS 125 MC02 INTRO TO CHRISTIANITY A 3.0 3.0 12.0
SPAN 101 MC03 ELEMENTARY SPANISH I A 3.0 3.0 12.0
CRIM 231 MC01 INTRO TO CRIMINAL JUSTI A 3.0 3.0 12.0
HIST 111 MC06 WESTERN CIVILIZATION I A 3.0 3.0 12.0
POLS 229 MC01 THE NATIONAL GOVERNMENT B 3.0 3.0 9.0
Dean's List
TERM: ATT: 15.5 CPT: 15.5 PTS: 59.0 GPA: 3.806
CUM : ATT: 15.5 CPT: 74.5 PTS: 59.0 GPA: 3.806

18SP1 2018 Spring UG AY: 2017
CRIM 232 MC01 INTRO TO CRIMINOLOGY A 3.0 3.0 12.0
CUC 200 MC01 CONNECTIONS A 0.5 0.5 2.0
HIST 112 MC04 WESTERN CIVILIZATION II A 3.0 3.0 12.0
MATH 160 MC04 ELEMENTARY STATISTICS A 3.0 3.0 12.0
PSYC 368 MC01 PSYC OF LEARNING AND CO A 3.0 3.0 12.0
SPAN 102 MC02 ELEMENTARY SPANISH II A 3.0 3.0 12.0
PSYC 260 MC03 DEVELOPMENTAL PSYCHOLOG B 3.0 3.0 9.0
Dean's List
TERM: ATT: 18.5 CPT: 18.5 PTS: 71.0 GPA: 3.838
CUM : ATT: 34.0 CPT: 93.0 PTS: 130.0 GPA: 3.824

18FAL 2018 Fall UG AY: 2018
CRIM 280 MC01 INTRODUCTION TO LAW ENF A 3.0 3.0 12.0
CUC 200 MC01 CONNECTIONS A 0.5 0.5 2.0
POLS 230 MC01 STATE AND LOCAL GOVERN A 3.0 3.0 12.0
PSYC 365 MC01 INDUSTRIAL PSYCHOLOGY A 3.0 3.0 12.0
PSYC 369 MC01 PHYSIOLOGICAL PSYCHOLOG A 3.0 3.0 12.0
PSYC 491 MC01 INTRODUCTION TO COUNSEL A 3.0 3.0 12.0
SPAN 201 MC07 INTERMEDIATE SPANISH I A 3.0 3.0 12.0
President's List
TERM: ATT: 18.5 CPT: 18.5 PTS: 74.0 GPA: 4.000
CUM : ATT: 52.5 CPT: 111.5 PTS: 204.0 GPA: 3.886

19SP1 2019 Spring UG AY: 2018
CRIM 270 MC01 COURTS AND PROCEDURES A 3.0 3.0 12.0
CRIM 362 MC01 JUVENILE JUSTICE A 3.0 3.0 12.0
POLS 450 MC01 DEVELOP AMER CONSTITUTI A 3.0 3.0 12.0
PSYC 267 MC01 STAT FOR SOCIAL SCIENCE A 3.0 3.0 12.0
PSYC 461 MC01 ABNORMAL PSYCHOLOGY A 3.0 3.0 12.0
PSYC 463 MC01 EDUC AND PSYCHOLOGICAL A 3.0 3.0 12.0
President's List
TERM: ATT: 18.0 CPT: 18.0 PTS: 72.0 GPA: 4.000
CUM : ATT: 70.5 CPT: 129.5 PTS: 276.0 GPA: 3.915

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CRIM 470 SA01 CRIT. ISS. IN CRIM JUS A 3.0 3.0 12.0
CRIM 454 MC02 CRIMINAL JUSTICE INTERN A 3.0 3.0 12.0
TERM: ATT: 6.0 CPT: 6.0 PTS: 24.0 GPA: 4.000
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POLS 260 MC01 SCOPE/METHODS POLITICAL B 3.0 3.0 9.0
POLS 339 MC01 ETHICS IN GOVERNMENT A 3.0 3.0 12.0
PSYC 480 MC01 HISTORY OF PSYCHOLOGY A 3.0 3.0 12.0
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CUM : ATT: 92.5 CPT: 151.5 PTS: 361.0 GPA: 3.903

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CRIM 361 MC01 CRIMINAL LAW A 3.0 3.0 12.0
ENGL 424 MC01 ARGUMENT AND PERSUASION A 3.0 3.0 12.0
MATH 212 MC01 LOGIC A 3.0 3.0 12.0
PSYC 330 MC01 RESEARCH MTHDS-BEHAV/SO A 4.0 4.0 16.0
President's List
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CRIM 360 MC01 CRIMINAL JUSTICE ADM A 3.0 3.0 12.0
CRIM 441 MC01 CRIMINAL JUSTICE POLICY A 3.0 3.0 12.0
CRIM 430 MC01 CORRECT PHILOSOPHIES & A 3.0 3.0 12.0
PSYC 471 MC01 CLINICAL PSYCHOLOGY A 3.0 3.0 12.0
CRIM 420 MC01 CRIMINAL INVESTIGATIONS A 3.0 3.0 12.0
President's List
TERM: ATT: 18.0 CPT: 18.0 PTS: 72.0 GPA: 4.000
CUM : ATT: 127.5 CPT: 186.5 PTS: 501.0 GPA: 3.929

21SP1 2021 Spring UG AY: 2020
CRIM 482 MC01 SEMINAR IN CRIMINAL PRO A 4.0 4.0 16.0
HIST 345 MC01 HIST OF ENGL FROM 1000- A 3.0 3.0 12.0
POLS 447 MC01 ANCIENT POLITICAL THOUG A 3.0 3.0 12.0
SPAN 202 MC01 INTERMEDIATE SPANISH II A 3.0 3.0 12.0
President's List
TERM: ATT: 13.0 CPT: 13.0 PTS: 52.0 GPA: 4.000
CUM : ATT: 140.5 CPT: 199.5 PTS: 553.0 GPA: 3.936

* DEGREE EARNED 05/2021 *
* BA Bachelor of Arts *
* GPA: 3.936 RANK: 26/530 *
* Major: Criminal Justice *
* SC Summa Cum Laude *

* DEGREE EARNED 05/2021 *
* BS Bachelor of Science *
* GPA: 3.936 RANK: 26/530 *
* Major: Psychology *
* SC Summa Cum Laude *

June 15, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Donny Stewart as a clerk for your chambers. I have known Donny since his 1L year at Wake Forest, when he approached me to discuss research and volunteer opportunities in criminal law. I worked alongside him in my capacity as the advisor for the Society for Criminal Justice Reform (SCJR), and he was a top student in my spring seminar on prosecutors. Based on my experiences with him, I consider him to be a kind, curious, and driven person who would contribute significantly to both the work and culture of your chambers.

I have had the pleasure of working with Donny both as a student and as a peer. He is the first in his family to attend college and the first to attend law school, and we at Wake Forest felt strongly enough about his unique perspective to offer him the Fletcher Scholarship for a full ride, which only one student per class receives. His passion for criminal law is driven by a broad care for community as well as personal experiences with the harm that incarceration can cause families. He has repeatedly demonstrated thoughtfulness and empathy, both in my class (through creative ideas and challenging questions) and in his contributions to our local legal community (such as his work with the Inn of Court and planning events for SCJR). When he encounters new or unfamiliar issues, Donny unhesitatingly searches for more information and seeks out whoever may be able to help him understand. I have been so impressed with this quality of his that I invited him to be my research assistant next fall.

Donny is not a traditional federal clerkship candidate; he is motivated to develop the skills that will help him serve his clients and community, rather than seeking prestige. In short, he wants to understand the law and its practicalities in order to create justice where it is missing. To that end, he has already sought out experience in prosecution, defense, and a federal district chambers. He has pursued training in oral advocacy, criminal legal work, and volunteer work that brought him in direct contact with men imprisoned as children who are seeking clemency review. While he has not participated in a journal, his research and writing in my class leads me to recommend him with absolute confidence.

I consider Donny to be deeply compassionate, inquisitive, and insightful. I am excited to work with him more before he graduates, and I believe he would be an excellent addition to your chambers. If I can be of any assistance in reviewing his application, please feel free to contact me.

Sincerely,
Eileen R. Prescott

Cell: (309) 229-3311

Email: prescoe@wfu.edu

Eileen Prescott - prescoe@wfu.edu



Re: Donny Stewart

To whom it may concern:

This letter is written to recommend Mr. Donny Stewart for a judicial clerkship in your chambers. I have had the pleasure of knowing Donny for the past two years as he has matriculated at Wake Forest University School of Law. Donny has been both an excellent student in three of my legal writing classes and an extraordinary teacher's assistant (TA) for two of those classes. Donny ranks in the top 5% of students whom I've taught in my nineteen years of law teaching. He is a natural writer with tremendous lawyering instincts and an indomitable work ethic. Yet despite being extremely talented, he is very humble.

I met Donny in Fall 2021 as a 1L in my Legal Analysis, Writing, and Research (LAWR) I class. LAWR I is Wake Law's first semester legal writing course that introduces first-year law students to the foundational skills necessary for effective legal analysis with a focus on objective writing. He was initially reserved in class, but it became apparent rather quickly that he was a natural writer, meaning that he was astute to the ways in which words fit together to form clear and cogent work products. It also became clear fairly early that he was a solid legal writer. While many students struggle with pivoting to the more technical form of writing that legal writing is, Donny handled the transition with relative ease and ultimately earned a grade of A- in LAWR I. During Spring 2022, he continued to thrive in LAWR II, which is the second semester first-year legal writing course at Wake Law that focuses on persuasive writing skills. Each student is tasked with crafting a trial brief and giving an oral argument. Once again, Donny produced an impressive trial brief and gave a strong oral argument, earning an A- in the class. In Fall 2022, Donny enrolled in my LAWR III (Appellate Advocacy) course, one of Wake Law's upper-level writing courses that tasks the students with constructing an appellate brief and giving an oral argument. Though the work is intensive and the issues more complex than those in the LAWR II trial brief, Donny thrived in the pre-writing and drafting stages of constructing the brief. He worked tirelessly to identify, draft, and perfect his legal arguments and earned an A in the course.

Whether working independently or collaboratively, Donny always works hard (and effectively) to produce a solid work product. In my LAWR I and II classes, I divide the students into smaller groups that are simulative of a law firm. In Appellate Advocacy, the groups are larger, but the premise is the same. This model helps to teach the practicality and the importance of collaborating as an attorney, while ensuring that each student is still accountable for his own work. Donny was able to work collaboratively, willingly contributing during group work, and he was also able to work alone, starting his assignments early and working hard to submit his best work.

Because of his excellent writing skills and his tremendous work ethic, I hired Donny to be one of my LAWR I and II TAs this past academic year. As my LAWR I and II TA, students are tasked with working one-on-one with a group of five first-year students on their formative and summative legal writing assignments. This may include giving oral and written feedback, conferencing, and organizing and conducting writing workshops with my other TAs. The students absolutely loved him, and they all seemed to thrive under his tutelage. Specifically, they expressed great thanks for his help in preparing them for oral argument. So much so that I have also hired him to be a TA for my Appellate Advocacy for Fall 2023. More importantly, this Summer, Donny has been hired to be a judicial law clerk to Judge Loretta C. Biggs, District Court Judge for North Carolina's Middle District. Based on all the foregoing, I have every confidence that he will acquit himself well in her chambers.

As a former state appellate law clerk and staff attorney, I fully appreciate the skillset required to be a successful clerk. I fully believe that Donny has the legal writing skills, the work ethic, and temperament to be an excellent

judicial law clerk. Given the opportunity to hone those skills in your chambers, I have every confidence that he will go on to achieve great things in the legal profession.

In closing, I highly recommend Donny Stewart for a judicial clerkship in your chambers. As noted above, he possesses all the qualities that a good law clerk must have. If you should require further information, you may contact me at 919-219-5468 or gibsonb@wfu.edu.

Sincerely,

A handwritten signature in black ink, appearing to read "Brenda D. Gibson". The signature is fluid and cursive, with a long, sweeping underline.

Brenda D. Gibson
Associate Professor of
Legal Analysis, Writing, and Research
Wake Forest University School of Law

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to highly recommend Donny Stewart to serve as a law clerk. I have known Donny since June 2022 when he began working as my research assistant at Wake Forest University School of Law. Donny is very bright, dependable, and eager to learn. He has a great attitude and work ethic; he is hardworking, respectful, and kind to others. I have had a wonderful experience working with Donny as my research assistant, and I have high confidence that he will be an excellent law clerk.

I have consistently been very impressed with Donny's intellect. He is very bright and has strong research and writing skills. I assigned open-ended questions to my research assistants, either through direct email or a google word document that I would update online. My research questions spanned several topics, including caselaw research on criminal and juvenile topics; federalism issues in juvenile law; and the connections between creativity and criminality. In every single research memo that Donny produced, it was very well-researched and written. He searched a wide array of legal databases, books, google scholar, and other sources to provide a comprehensive and thoughtful analysis of the topics. I knew that if Donny took on a project, that I did not have to worry about it or follow up with him. I always learned new things by reading Donny's work. He took initiative, and if he needed further guidance, he reached out to ask clarifying questions.

Donny also has a wonderful demeanor and attitude. I previously served as a law clerk for a federal district court judge in the Central District of California. I remember working closely with the judge, her staff, and my fellow law clerks in close quarters in a fast-paced, high-stressed environment. Donny has the disposition to excel in this environment. He is calm, eager to contribute and learn, respectful, and kind to others. He is responsible and works hard. I have had numerous in-person meetings with Donny and my other research assistants. We met twice a month in my office. I also observed Donny when he was interacting with other students at the LexisNexis table and when we shared lunch together with my other research assistants. He is welcoming, inclusive, and warm to others. I have no doubt that he will treat everyone he meets with respect.

It was without question that I would have continued working with Donny in my research this upcoming academic year. However, I am moving to another law school. I will certainly miss working with Donny. I was not surprised that another professor who had Donny as a student in her seminar class quickly hired him to work as a research assistant.

Thus far, Donny has used his legal training to consistently serve the public. He is passionate about justice and serving those in need. I know Donny will take every opportunity to grow and flourish as a law clerk, and then use his training and skills to continue to better our society.

If there are any questions that I can answer, please do not hesitate to reach me by email at esther.hong@asu.edu, or by phone at (909) 554-0233. Thank you for your time in reading this letter.

Respectfully,

Esther Hong
Associate Professor of Law

Esther Hong - esther.hong@asu.edu

Writing Sample

Donny Stewart
New Bern, NC 28562
(252) 474-6904

As a second-year student at Wake Forest University School of Law, I prepared the attached appellate brief as an assignment in my Appellate Advocacy course. The brief was filed in opposition to the grant of summary judgment for a school district that punished a student for exercising his First Amendment rights by wearing a political T-shirt. I have been permitted by my professor to use this appellate brief as a writing sample.

RECORD NO. 22-823

*In the
United States Court of Appeals
for the Sixth Circuit*

GAVIN PAINTER, by and through his father, DONALD
PAINTER,
Plaintiff-Appellant,

v.

AMY DOYLE, SUPERINTENDANT; EDISON MAGNET
MIDDLE SCHOOL; and DAYTON PUBLIC SCHOOL
SYSTEM,
Defendants-Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
OHIO

BRIEF OF APPELLANT

ISSUES PRESENTED

[This section has been omitted to comply with length requirements but can be provided upon request.]

STATEMENT OF THE CASE

[This section has been omitted to comply with length requirements but can be provided upon request.]

SUMMARY OF THE ARGUMENT

[This section has been omitted to comply with length requirements but can be provided upon request.]

STANDARD OF REVIEW

[This section has been omitted to comply with length requirements but can be provided upon request.]

ARGUMENT

This Court should reverse the U.S. District Court for the Southern District of Ohio's summary judgment order because the speech was not offensive, and the speech did not cause a material and substantial disruption. The First Amendment of the U.S. Constitution generally protects the freedom of speech from any governmental intrusion. U.S. Const. amend. I. This protection is still available to students in academic settings as the Supreme Court has held that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969). As such, Title 42, section 1983 of the United States Code serves as a

means for redress against anyone who uses their governmental authority to deprive another of their constitutional rights. 42 U.S.C. § 1983.

It is settled law that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506. However, the constitutional rights of students are not coextensive with that of adults in other settings. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). For that reason, any analysis of the student’s speech rights requires taking the age and maturity of the student and their audience into account. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). The Supreme Court has generally held that only speech that “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school” can be limited. *Tinker*, 393 U.S. at 513. In subsequent rulings, the Supreme Court has created exceptions for speech that is “lewd, vulgar, or plainly offensive,” *Fraser*, 478 U.S. 675 (1986); speech that is “school-sponsored,” *Kuhlmeier*, 484 U.S. 260 (1988); and speech that “advocates for drug usage.” *Morse v. Frederick*, 551 U.S. 393 (2007).

As the parties have conceded, Gavin’s shirt was neither school sponsored nor a promotion of drug usage, so *Kuhlmeier* and *Morse* are not controlling. This leaves the issues of whether the shirt was “lewd, vulgar, or plainly offensive,” under *Fraser*, and whether the shirt caused a “material and substantial disruption,” under *Tinker*, to be analyzed in greater detail below.

As this Court has previously held in *Boroff v. Van Wert City Board of Education*, the proper way to analyze the speech is to first determine whether it is

vulgar or plainly offensive under *Fraser*, and if it is not, to determine whether the speech created a threat of substantial disruption that would allow its prohibition under *Tinker*. *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 469 (6th Cir. 2000). Gavin respectfully requests that the Court reverse the summary judgment order because the speech was not lewd, vulgar, or plainly offensive and did not cause a material and substantial disruption, nor was there a reasonable forecast of such. Therefore, the district court erred in granting summary judgment for Defendants because they are not entitled to judgment as a matter of law.

I. The district court erred in concluding that Gavin’s speech was “lewd, vulgar, or plainly offensive” under *Fraser* because the speech possessed no sexual undertone and was purely political speech entitled to the highest level of protection.

Gavin’s speech was not “lewd, vulgar, or plainly offensive” because it did not have any sexual undertone, as *Fraser* requires, and even under a more expansive definition, the speech was purely political as it addressed pertinent issues. School officials can “prohibit the use of vulgar and offensive terms” as part of their role in teaching students the “fundamental values of ‘habits and manners of civility’ essential to a democratic society.” *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 435 (4th Cir. 2013) (quoting *Fraser*, 478 U.S. at 683, 681). However, schools cannot prohibit speech solely because “society finds the idea offensive or disagreeable.” *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d. Cir. 2001).

A. **The district court erred in concluding that Gavin’s speech was lewd, vulgar, or plainly offensive under *Fraser* because there was no sexual undertone to the shirt that was solely criticizing the policy views of Judge Brice.**

Gavin’s speech was not lewd, vulgar, or plainly offensive as it contained no sexual undertone or any similarly explicit or profane statements. Lewdness, vulgarity, and indecency normally connote sexual innuendo or profanity, and courts have treated “plainly offensive” synonymously. *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 327–28 (2d. Cir. 2006). First Amendment cases generally associate these terms with speech that is inherently crude, regardless of specific attitudes about the overall message. *Boroff*, 220 F.3d at 473 (Gilman, J., dissenting).

Speech is not plainly offensive solely because it upsets administrators. *Guiles*, 461 F.3d at 329. In *Guiles*, the student wore a political shirt that depicted the sitting President with drugs and alcohol. *Id.* at 322. The shirt evoked discussion among students and garnered a parent complaint based on differing political views, but otherwise went without incident for two months. *Id.* The student sued after the school forced him to cover the images and words depicting drugs and alcohol. *Id.* at 323. The court held that plainly offensive could not be as broad to apply to any speech that school administrators found to be displeasing or in poor taste. *Id.* at 329. The court reasoned that otherwise, “the rule in *Tinker* would have no real effect because it could have been said that the school administrators in *Tinker* found the wearing of anti-war armbands offensive.” *Id.* at 328.

Through the lens of *Guiles*, Gavin’s speech is far from plainly offensive under *Fraser*. Just like the plaintiff’s shirt in *Guiles*, Gavin’s shirt was clearly criticizing a

public figure in a way that lacked sexual connotations. Also like the plaintiff's shirt in *Guiles*, Gavin's shirt was not seen as offensive by the audience at large. While the plaintiff in *Guiles* received criticism from a student and parent with differing political views, Gavin's shirt was met with initial confusion, rather than opposition. Additionally, the shirt in *Guiles* contained blatant messages depicting the President using alcohol and drugs. In contrast, Gavin's shirt only contained words criticizing a retired judge's policy views and an image of a migrant child. *But see Fraser*, 478 U.S. at 684–85 (holding that speech is plainly offensive when it contained a sexual innuendo, was given at a mandatory assembly, and there were prior indications of its inappropriateness); *see also Pyle ex rel. Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157 (D. Mass. 1994) (finding that speech was plainly offensive when the shirts contained “overt sexual tag line[s]”).

Courts in some contexts have found shirts to be plainly offensive; however, that determination did not rely solely on a misinterpretation of the shirt's meaning. *See Broussard ex rel. Lord v. Sch. Bd. of City of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992) (concluding that a shirt reading “Drugs Suck” was inappropriate when it received immediate criticism from administration and the term could be understood by the public at large to have a sexual meaning). Here, Gavin's shirt did not receive the same level of collective disdain from a reasonable interpretation that the shirt in *Broussard* did. If the Court allows Doyle to limit Gavin's speech, even though the shirt contained no sexual undertone and was never understood to contain such, it will effectively allow school administrators to censor any speech that garners

criticism. Therefore, to be consistent with the holding in *Fraser*, the Court should reverse the summary judgment order because Gavin's shirt contained no sexual innuendos or perverse statements in its critique of Judge Brice's political views.

B. The district court erred in concluding that Gavin's speech was plainly offensive because, even under the broad construction of *Fraser*, the speech was solely political and not understood in a way that advocated harm.

Under *Boroff*, which uses a broader interpretation of plainly offensive, Gavin's speech was not plainly offensive because the speech was solely a form of political protest that was not understood to advocate harm. Schools are vital environments that provide education about diversity and how to approach and express diversity responsibly. *Barber ex rel. Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d 847, 858 (E.D. Mich. 2003). This allows schools to limit student speech considered inconsistent with its basic educational mission. *Kuhlmeier*, 484 U.S. at 266. However, the prohibition of speech cannot rest solely on the listener's disagreement with or misunderstanding of the speaker's viewpoint, especially if the speech was never meant to advocate or provoke harm. *Morse*, 551 U.S. at 434–37 (Stevens, J., dissenting). There must be more than hurt feelings, offense, or resentment to render the speech unprotected. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264–65 (3d. Cir. 2002); see *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (holding that “insulting, disrespectful or even threatening” language is not lewd, vulgar, or plainly offensive when context makes an alternative interpretation more likely).

Speech cannot be barred solely because of its “implicitly” offensive nature. *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 645 (D.N.J. 2007). In *DePinto*, two fifth-grade students wore buttons with an image of the Hitler Youth in protest of the school uniform policy. *Id.* at 635. Despite the lack of Nazi symbols and the blurriness of the image, the school suspended the students on the grounds that the images were plainly offensive. *Id.* The court found that while the image could be interpreted as insulting or in poor taste, it fell short of being plainly offensive to warrant its suppression. *Id.* at 645. The reasoning of the court focused on the lack of symbols showing that the image was of the Hitler Youth, stating that “the young men might easily be mistaken for a historical photograph of the Boy Scouts.” *Id.*

Here, similar to the plaintiffs in *DePinto*, Gavin’s speech also falls short of being plainly offensive. Like the buttons in *DePinto*, Gavin’s shirt was purely a form of political protest. The buttons in *DePinto* were worn to protest the school’s uniform policy. Similarly, Gavin’s shirt was an act of protest against the policy views of Judge Brice. Also, both plaintiffs in *DePinto*’s speech and Gavin’s lack any indicia of offensive content. There were no symbols that connected the image to Nazism in the same way that there were no indicators that connect Gavin to the Mafia. However, it is indisputable that the term “ice” pales in comparison to the messages espoused by the Nazis, so the allowance of the more “offensive” message with a younger audience is indicative of the importance of political speech rights in all academic settings, regardless of age.

Additionally, like the buttons in *DePinto*, Gavin's shirt was not connected to a violent group. In *DePinto*, the buttons did not show any prominent connection to the Nazis. The court noted that the image could have been mistaken as a historical image of the Boy Scouts. Similarly, Gavin's shirt showed no affiliation with the Mafia or similar violent groups to give merit to Doyle's interpretation of "ice." The sources consulted by Doyle both showed kill as the last definition, and some iteration of chill, which was the meaning posited by Gavin, as the first. It is also generally well-known that I.C.E. is the organization connected with immigration policy. Every party to whom Gavin was able to explain the meaning of the shirt readily accepted his interpretation, so Doyle's misinterpretation of the message, due to her inexperience with Edison's students, was an insufficient basis to limit the speech.

Furthermore, as a case decided by this Court, *Boroff* may seem instructive; however, that case is readily distinguishable. The speech in *Boroff* conflicted with the school's educational mission, while Gavin's speech embodied it. *See Boroff*, 220 F.3d at 470–72 (holding that Marilyn Manson shirts were plainly offensive because they implicitly promoted drug usage, racism, and other demoralizing messages that conflicted with the school's educational mission). Here, Edison's educational mission promotes students going beyond the classroom material and advocating their views in respectful ways; however, the school's first instinct was to punish Gavin for doing just that. Gavin's interest in immigration policy arose from a classroom discussion,

and he chose the most respectful and passive form of political advocacy at his disposal: a shirt encouraging the judge to reconsider his policy views.

In addition, the Supreme Court has provided clear guidance that rejects the broad definition of plainly offensive that *Boroff* employed. *See Morse*, 551 U.S. at 409 (concluding that the holding in *Fraser* cannot be “read to encompass any speech that could fit under some definition of ‘offensive’”). Therefore, this Court should reverse the summary judgment order because Gavin’s shirt was purely political speech and was not understood by any parties to advocate harm to anyone.

II. [This section has been omitted to comply with length requirements but can be provided upon request.]

CONCLUSION

For the reasons stated herein, Plaintiff-Appellant respectfully requests that the Court reverse the summary judgment order.

This the 12th day of October, 2022.

Applicant Details

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Applicant Education

BA/BS From	University of Pittsburgh
Date of BA/BS	April 2018
JD/LLB From	University of Virginia School of Law
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Date of JD/LLB	May 10, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Virginia Law & Business Review
Moot Court Experience	Yes
Moot Court Name(s)	Lile Moot Court Competition

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June 12, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker

I am a rising third-year student at the University of Virginia School of Law and current summer associate at the law firm Covington & Burling. I am writing to apply for a clerkship in your chambers beginning in 2024.

Enclosed please find my resume, law school transcript, and writing sample. The writing sample is a note written for my Race and Criminal Justice class, examining due process guarantees extended to students faced with short suspensions. Additionally, letters of recommendation from the following individuals are included with my application:

Professor Josh Bowers
University of Virginia School of Law

Professor Kim Forde-Mazrui
University of Virginia School of Law

Mr. Charles Rombeau
Assistant United States Attorney, District of New Hampshire

If there is any other information that would be helpful in evaluating my candidacy, please let me know. Thank you for your consideration.

Respectfully,

Nikhyl Sud